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Title: Dean Witter Reynolds Inc., Petitioner
v.
A. Lamar Byrd

Docketed:
April 19, 1984

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Bell, Eugene M.

Counsel for respondent: Benham, Eric V.

Entry	Date	Note	Proceedings and Orders
1	Apr 19 1984	G	Petition for writ of certiorari filed.
2	May 17 1984		Brief of respondent A. Lamar Byrd in opposition filed.
3	May 22 1984		DISTRIBUTED. June 7, 1984
4	May 29 1984	X	Reply brief of petitioner Dean Witter Reynolds, Inc. filed.
5	Jun 11 1984		Petition GRANTED.
			**********
6	Jul 26 1984		Joint appendix filed.
7	Jul 26 1984		Brief of petitioner Dean Witter Reynolds, Inc. filed.
8	Jul 26 1984	G	Motion of Securities Industry Association, Inc., et al. for leave to file a brief as amici curiae filed.
9	Aug 1 1984		Record filed.
11	Aug 21 1984		Order extending time to file brief of respondent on the merits until September 10, 1984.
12	Sep 10 1984		Brief of respondent A. Lamar Byrd filed.
13	Sep 18 1984		Motion of Securities Industry Association, Inc., et al. for leave to file a brief as amici curiae GRANTED.
14	Oct 11 1984		CIRCULATED.
15	Oct 22 1984		SET FOR ARGUMENT. Tuesday, December 4, 1984. (3rd case).
16	Nov 13 1984	X	Reply brief of petitioner Dean Witter Reynolds, Inc. filed.
17	Dec 4 1984		ARGUED.

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PETITION FOR WRIT OF CERTIORARI

83-1708

(1)

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No. ..-....

IN THE

Supreme Court of the United States

October Term, 1983

DEAN WITTER REYNOLDS INC.,

Petitioner,

vs.

A. LAMAR BYRD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

MEMORANDUM FOR THE PETITIONER.

EUGENE W. BELL,
JONES, BELL, SIMPSON & ABBOTT,
A member of the Bar of the Supreme Court and Counsel of Record for Petitioner; and
KEVIN K. FITZGERALD,
JONES, BELL, SIMPSON & ABBOTT,
800 Wilshire Boulevard,
Fifth Floor,
Los Angeles, Calif. 90017,
(213) 485-1555,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Question Presented.

Whether the district court erred in denying petitioner's motion for an order compelling arbitration of respondent's pendent claims and staying arbitration pending judicial resolution of respondent's federal securities claim.

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DEAN WITTER REYNOLDS INC.,

Petitioner,

vs.

A. LAMAR BYRD,

Respondent.

MEMORANDUM FOR THE PETITIONER.

Opinions Below.

The opinion of the court of appeals (Pet. App. A) is reported at 726 F.2d 552 (9th Cir. 1984). The order of the district court (Pet. App. B) is not reported.

Jurisdiction.

The judgment of the court of appeals was entered on February 22, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes Involved.

1. Section 2 of the United States Arbitration Act, 9 U.S.C. §2 provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement

in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

2. Section 3 of the Act, 9 U.S.C. §3 provides:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Statement of the Case.

Plaintiff and respondent A. Lamar Byrd (hereinafter "respondent") filed his complaint against defendant and petitioner Dean Witter Reynolds Inc.[1] (hereinafter "petitioner") on December 1, 1982. The complaint consists of five separate claims for relief. Only the first claim is alleged to arise under federal law. Respondent's first claim is for alleged violation of the Securities Exchange Act of 1934[2] (the "Exchange Act").

The respondent's remaining four claims are based on alleged violations of state law and are present in the federal forum due to the diversity of citizenship of the parties, and because of the principle of pendent jurisdiction. The respondent has denominated these pendent state claims as: "California Corporations Code §§25401, 25501 and 25504", "Fraud and Deceit", "Breach of Fiduciary Duty", and "Negligent Mismanagement".

[1]Petitioner Dean Witter Reynolds Inc. is a wholly owned subsidiary of Dean Witter Financial Services Inc., which is, in turn, a wholly owned subsidiary of Sears, Roebuck & Co.

[2]15 U.S.C. §78a, *et seq*.

The allegations as to the basis for subject matter jurisdiction of the respondent's claims in the federal district court are made in the third paragraph of respondent's complaint. Respondent alleges:

> "This Court had jurisdiction of this action under the provisions of §27 of the Securities and Exchange Act of 1934, 15 U.S.C. §78(a) [sic], 28 U.S.C. §1331(a) [sic] and 1332(a), and by virtue of its pendant [sic] jurisdiction over non-Federal claims arising from the same facts as the Federal causes of action [sic]. The controversy exceeds the sum of $10,000 exclusive of interest and costs."

Respondent alleges in the first paragraph of his complaint that the action "arises under §10(b) and 15c and 20 of the Securities Exchange Act of 1934 as amended, 15 U.S.C. §§78j(b), 17 [sic] o(c) and 78t, California Corporations Code §§25401, 25501 and 25504, and certain common law theories."

The allegations supporting respondent's claims for relief include, *inter alia*, that respondent opened an account with petitioner in reliance upon various representations by petitioner's agent; that petitioner's agent traded in respondent's account without the prior consent of respondent; that the number of transactions executed in respondent's account was excessive; that misrepresentations were made by petitioner's agent as to the status of respondent's account; and that petitioner's agent acted with the knowledge, participation, and ratification of petitioner.

In August of 1981, when the respondent commenced doing business with the petitioner, a written contract was

entered into between the parties concerning their rights and obligations with respect to the conduct of respondent's securities account. That contract, the Customer's Agreement, contains a provision requiring arbitration of any controversy arising out of the conduct of the account. (Pet. App. C)

In light of its contract with the respondent to arbitrate any controversy arising out of respondent's account, but recognizing that agreements to arbitrate claims arising under Section 10(b) of the Exchange Act are presently held to be unenforceable,[3] the petitioner filed a motion for an order severing and compelling arbitration of the respondent's pendent state law claims. Further, in recognition of the exclu-

[3]This Court held in *Wilko v. Swan*, 346 U.S. 427 (1953), that arbitration of claims asserted under Section 12(2) of the Securities Act of 1933, 15 U.S.C. §771(2) (the "Securities Act"), could not be compelled. This decision was based on language in Section 14 of the 1933 Act, 15 U.S.C. §77n, to the effect that provisions in agreements waiving compliance with provisions of the 1933 Act are void. Due to the existence of a similar provision in the Exchange Act (Section 29, 15 U.S.C. §78cc), some district courts and courts of appeal have held that agreements to arbitrate claims arising under Section 10(b) of the Exchange Act are unenforceable. *See, e.g., DeLancie v. Birr, Wilson & Co.*, 648 F.2d 1255, 1259 (9th Cir. 1981); *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977); *Greater Continental Corp. v. Schechter*, 422 F.2d 1100, 1103 (2d Cir. 1970); *Macchiavelli v. Shearson, Hammill & Co.*, 384 F.Supp. 21, 27-28 (E.D.Cal. 1974).

This Court has not directly addressed the issue of whether the judicially created exception to arbitration announced in *Wilko* applies to Exchange Act claims. On the contrary, in *Scherk v. Alberto Culver Co.*, 417 U.S. 506 (1974), this Court noted that the Exchange Act neither establishes the "special right" found significant in *Wilko*, nor does it contain certain of the provisions of the Securities Act that the Court in *Wilko* held could not be waived by Wilko's agreement to arbitrate. This Court in *Scherk* nevertheless accepted "the premise" that the operative portions of the Securities Act relied on in *Wilko* were contained in the Exchange Act, but found it unnecessary to decide the issue since there were "crucial differences" between the agreements in *Scherk* and *Wilko*.

Were this Court to find that the *Wilko* exception to the enforceability of arbitration agreements does not apply to Exchange Act claims, the issue sought to be reviewed in this Court in the instant case would be obviated since all of the respondent's claims would be arbitrable.

sive jurisdiction of the federal courts over Exchange Act claims, the petitioner's motion to compel arbitration also sought a stay of arbitration of the pendent state claims pending resolution of respondent's Exchange Act claim in the federal district court.

By its order entered March 14, 1983 (Pet. App. B), the United States District Court denied the petitioner's motion in its entirety. The United States Court of Appeals for the Ninth Circuit affirmed (Pet. App. A), holding that "when there are arbitrable and nonarbitrable claims arising out of the same transaction, the district court should have discretion to evaluate the degree to which the claims are intertwined. If the district court determines that they are so intertwined that the purposes of the Arbitration Act and the protective intent of the federal securities laws would be frustrated by separating the claims, then it should refuse to separate them".

ARGUMENT.

The decision of the court of appeals is incorrect and should be reviewed by this Court.

1. The Decision of the Court of Appeals for the Ninth Circuit, While in Agreement With the Decisions of the Fifth Circuit,[4] Conflicts With the Decisions of the Sixth[5] and Seventh[6] Circuits.

The Courts of Appeal which have considered cases containing both arbitrable and nonarbitrable claims are currently evenly divided as to the appropriate procedure for resolving such disputes. Resolution of this conflict among the circuits is necessary in order to achieve uniform application of federal law. Parties in the Ninth and Fifth Circuits currently are being denied their contractual right to arbitration of clearly arbitrable claims due to the presence of those claims in the federal forum as claims pendent to nonarbitrable federal securities claims. Even this denial, however, is not the result in every instance, as these Circuits have held that the district courts have discretion to either retain the arbitrable pendent claims for judicial resolution with the federal securities claim, or sever and order arbitration of the pendent claims. The exercise of this "discretion" is to involve an evaluation of the degree to which the claims are intertwined factually. Under the Fifth and Ninth Circuit decisions, if the claims are sufficiently intertwined, the district courts are to refuse to separate them to avoid allegedly inefficient dispute resolution.

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[4] *Miley v. Oppenheimer & Co.*, 637 F.2d 318 (5th Cir. 1981); *Sibley v. Tandy Corp.*, 543 F.2d 540 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977).

[5] *Liskey v. Oppenheimer & Co.*, 717 F.2d 314 (6th Cir. 1983).

[6] *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638 (7th Cir. 1981).

Since all pendent claims which are present with federal claims in the federal forum have a "common nucleus of operative fact",[7] however, the actual exercise of this discretion would invariably permit retention of such claims by the district courts and a denial of arbitration. This is true because any claim which has sufficient factual intertwining to be present in federal court under the principle of pendent jurisdiction is intertwined sufficiently to avoid arbitration under the Fifth Circuit and Ninth Circuit doctrine.

The proper approach under the Federal Arbitration Act and federal securities laws is that mandated by the Sixth and Seventh Circuits: when confronted with numerous state claims pendent to a federal securities claim but subject to a valid arbitration agreement, a district court should sever the pendent claims, order them to arbitration, and stay the arbitration pending adjudication of the federal claim retained in the district court. This solution preserves the exclusive jurisdiction of the federal courts over Exchange Act claims and gives appropriate weight to the Federal Arbitration Act and the federal policy favoring arbitration.

Moreover, the problems envisioned by the Ninth and Fifth Circuits and cited as grounds for denial of arbitration appear to be eliminated by this solution of the Sixth and Seventh Circuits. The Ninth Circuit fears frustration of the "protective intent of the federal securities laws"[8] and the Fifth Circuit sees a "threat . . . to the exclusive federal jurisdiction"[9] over federal securities claims by arbitration of pendent state claims. By retaining and resolving judicially the federal securities claim prior to arbitration of the state claims, however, the protective intent of the federal secu-

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[7] *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

[8] Pet. App. A at 4.

[9] *Miley v. Oppenheimer & Co., Inc.*, 637 F.2d at 336.

rities laws is held inviolate and the exclusive federal jurisdiction is not threatened.

The other problem cited by the Ninth and Fifth Circuits as a ground for denying severance and arbitration of pendent state claims is the alleged inefficiency of the procedure. This alleged inefficiency is disputed by the Sixth[10] and Seventh[11] Circuits since judicial resolution of any federal claim would have collateral estoppel impact on a subsequent arbitration. In fact, this collateral estoppel effect arguably makes bifurcated resolution more efficient than judicial resolution of all claims in federal court. Even if the procedure is less efficient, however, the two most recent arbitration decisions of this Court[12] suggest that the Federal Arbitration Act nevertheless mandates arbitration of those claims subject to a valid arbitration agreement.

2. The Decision of the Court of Appeals Requires an Exercise of This Court's Power of Supervision.

The decision reached by the Ninth Circuit and the previous decisions of the Fifth Circuit on the instant issue appear to conflict with this Court's recent decision in *Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.*[13] Although not directly addressing the instant issue, this Court in *Cone* footnoted the Seventh Circuit decision in *Dickinson v. Heinold Securities, Inc.*[14] for its conclusion that the Arbitration Act establishes that "any doubts concerning the scope of arbitrable issues should be resolved in favor of

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[10]*Liskey v. Oppenheimer & Co., Inc.*, 717 F.2d at 320.

[11]*Dickinson v. Heinold Securities, Inc.*, 661 F.2d at 644.

[12]*Southland Corp. v. Keating*, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.*, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

[13]103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

[14]661 F.2d 638 (7th Cir. 1981).

arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."[15]

Further, the Sixth Circuit decision in *Liskey v. Oppenheimer & Co.*,[16] reached after this Court's decision in *Cone*, based that decision in part on the statement in *Cone* that "the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement."[17] The Sixth Circuit suggested that this language implied that this Court would reject consolidation of nonarbitrable federal and arbitrable state claims and denial of arbitration of state claims if presented with the issue.[18]

Although the *Cone* decision was cited and discussed in the briefs filed in the court of appeals in the instant case, the Ninth Circuit did not reference or attempt to distinguish the decision in its opinion.

The Ninth and Fifth Circuit decisions also appear to conflict with this Court's recent decision in *Southland Corp. v. Keating*.[19] This Court's decision in *Keating* was announced after submission of briefs and oral argument in the instant case, but one month prior to the Ninth Circuit's opinion. In *Keating*, this Court upheld arbitration pursuant to contract in the face of a conflicting California statute.

Although not directly addressing the instant issue, the analysis by this Court in *Keating* is applicable to the instant case and would appear to mandate a contrary result. Noting first that "[p]lainly the effect of the judgment of the California court is to nullify a valid contract made by private

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[15]103 S.Ct. at 941-42, 74 L.Ed.2d at 785.

[16]717 F.2d 314 (6th Cir. 1983).

[17]103 S.Ct. at 939, 74 L.Ed.2d at 782 (emphasis in original).

[18]717 F.2d at 320.

[19]104 S.Ct. 852, 79 L.Ed.2d 1 (1984).

parties under which they agreed to submit all contract disputes to final, binding arbitration",[20] this Court feared that the California interpretation of the Federal Arbitration Act would encourage forum shopping:

> "We are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted."[21]

The Ninth Circuit interpretation in the instant case and the Fifth Circuit decisions similarly make the right to enforce an arbitration contract dependent on the particular forum in which it is asserted: common law claims brought in state courts and subject to an arbitration agreement are regularly ordered to arbitration, while those same claims, if appended to a federal securities claim, may be retained for judicial resolution in the federal courts of those circuits.

In light of the *Cone* and *Keating* decisions, the decision of the Ninth Circuit in the instant case requires an exercise of this Court's power of supervision.

3. The Decision of the Court of Appeals Will Serve to Increase Litigation in the Federal Courts.

Under the Ninth and Fifth Circuit decisions the mere assertion of a "colorable" federal securities claim may enable a plaintiff to avoid his or her contractual duty to arbitrate claims based on state law, if the district court exercises its discretion to retain the arbitrable claims for judicial resolution. The *Wilko* "exception" thus may be used to emas-

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[20] 104 S.Ct. at 856, 79 L.Ed.2d at 10.
[21] 104 S.Ct. at 860, 79 L.Ed.2d at 15.

culate the mandate of Congress as expressed in the Federal Arbitration Act and to increase litigation of matters in the federal courts which properly belong in arbitration.

4. This Court Should Review the Instant Case Because It Concerns a Matter of Considerable Public Importance.

Although it was not referenced in the Ninth Circuit opinion, a brief was filed in the court of appeals by the Securities Industry Association, Inc. as amicus curiae. This organization represents over 500 securities firms in the United States and Canada. Its interest stems from its belief that arbitration is an economical and desirable method of resolving disputes between securities broker-dealers and their customers.

Further, the issue presented in the instant case is one that recurs with frequency in the federal courts. The claims asserted rarely vary. The typical mixed arbitrable/nonarbitrable claims case involves a claim based on Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder and various pendent state claims, such as common law fraud, breach of contract or breach of fiduciary duty, asserted as independent claims all arising out of the same factual scenario. Review by this Court will establish a uniform rule on the issue presented by the instant case for future application by the district courts.

Conclusion.

A review of the issue in the instant case by this Court will resolve a conflict between the circuit courts of appeals on an important question of federal law concerning the right of contracting parties to arbitration, address a matter of considerable importance to both the securities industry and the general public, promote consistent decisions in cases

with similar facts in the district courts, and constitute a proper and necessary exercise of the Court's power of supervision. For these reasons petitioner respectfully requests that this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

DATED: April 12, 1984.

Respectfully submitted,

EUGENE W. BELL,
JONES, BELL, SIMPSON & ABBOTT,
A member of the Bar of the Supreme Court and Counsel of Record for Petitioner; and
KEVIN K. FITZGERALD,
JONES, BELL, SIMPSON & ABBOTT,
Attorneys for Petitioner.

APPENDIX A.

Opinion.

United States Court of Appeals for the Ninth Circuit.

A. Lamar Byrd, Appellant, v. Dean Witter Reynolds, Inc., a Delaware corporation, Appellee. No. 83-5736. DC No. CV 82-1655.

Filed: February 22, 1984.

Appeal from the United States District Court for the Southern District of California.

Howard B. Turrentine, District Judge, Presiding.

Argued and submitted December 6, 1983.

BEFORE: GOODWIN and TANG, Circuit Judges and AGUILAR,* District Judge.

GOODWIN, Circuit Judge

Dean Witter appeals the denial of its motion for an order severing Byrd's pendent state-law claims, compelling their arbitration, and staying such arbitration until after resolution of his federal securities claim. We have jurisdiction because the denial of the stay is an interlocutory order refusing an injunction under 28 U.S.C. § 1292(a)(1). We affirm.

Byrd alleges that he sold his dental practice and invested the $160,000 proceeds through Gale, Dean Witter's employee. Between September 1981 and March 1982 the value of the account declined by more than $100,000 due to allegedly improper handling by Gale. During this period Byrd alleges that Gale represented that the account was making a profit. The broker-client contract contained an agreement to arbitrate disputes arising out of the management of the account.

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*The Honorable Robert P. Aguilar, United States District Judge for the Northern District of California, sitting by designation.

The United States Arbitration Act, 9 U.S.C. § 1, *et seq.*, provides that arbitration agreements are to be given effect. A federal court must stay an action if an issue involved is subject to a written arbitration agreement, 9 U.S.C. § 3. Notwithstanding the statute and the contractual agreement to arbitrate, because of the protective intent of the federal securities laws, arbitration of Byrd's claim under the Securities Exchange Act of 1934 is not compelled. *Wilko v. Swan*, 346 U.S. 427 (1953); *De Lancie v. Birr, Wilson & Co.*, 648 F.2d 1255, 1259 (9th Cir. 1981); *Sibley v. Tandy Corp.*, 543 F.2d 540, 543-544 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977) (requiring arbitration of contractual claims before judicial resolution of securities claims); *Greater Continental Corp. v. Schechter*, 422 F.2d 1100, 1103 (2d Cir. 1970).

In response to Dean Witter's contention that the federal securities claim should be tried in federal court and that the state-law claims should be arbitrated afterwards, Byrd asserts that the state and federal claims are so intertwined that to try them sequentially would cause needless delay and expense. We have previously addressed the doctrine of intertwining only once, by way of an approving reference in a footnote. *De Lancie v. Birr, Wilson & Co.*, 648 F.2d at 1258-1259 n.4. District courts in the Ninth Circuit are split on this issue. *Roueche v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 554 F.Supp. 338 (D. Hawaii 1983), and *Macchiavelli v. Shearson Hammill & Co.*, 384 F.Supp. 21, 31 (E.D. Cal. 1974), adopted the bifurcated approach, *i.e.*, trying the federal claims first and then leaving the state-law claims for arbitration. *Cunningham v. Dean Witter Reynolds, Inc.*, 550 F.Supp. 578 (E.D. Cal. 1982), and *Milani v. Conticommodity Services Inc.*, 462 F.Supp. 405, 407 (N.D. Cal. 1976), adopted the intertwining approach, *i.e.*, not saving the state-law claims for arbitration. *Cunningham*, *Macchiavelli*, and *Milani* all asserted that the district court had discretion whether to order arbitration of the state-law claims or to try all claims in federal court.

Some courts have held denial of arbitration to be justified when the facts supporting all of the claims are intertwined, because arbitration of state claims could produce results that in effect would bind the federal court through issue preclusion as to the facts material to the federal securities claims. *See, e.g., Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023 (11th Cir. 1982); *Miley v. Oppenheimer & Co.*, 637 F.2d 318 (5th Cir. 1981).

Other circuits have held that when nonarbitrable federal securities claims are joined with claims subject to a valid arbitration agreement, a district court must separate the federal and state claims, order arbitration of the state claims, and stay arbitration of the state claims pending resolution of the federal securities claim. *Liskey v. Oppenheimer & Co.*, 717 F.2d 314 (6th Cir. 1983);[1] *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638 (7th Cir. 1981).

Given that "a federal court has the sole right to decide the ultimate issues essential to a federal securities law claim," *Dickinson*, 661 F.2d at 643-44, the problem with the result in *Dickinson* and *Liskey* is that it may frustrate the purpose of the Arbitration Act, *i.e.*, fast, inexpensive dispute resolution. It may also frustrate the intent of the federal securities laws to preserve access to the federal courts. *Wilko v. Swan, supra*. The Arbitration Act in 9 U.S.C. § 3 evidently did not anticipate the pleading of arbitrable and nonarbitrable claims arising out of closely intertwined, if not

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[1] *Liskey* would seem to overrule *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1030-31 (6th Cir. 1979) (directing the trial court to try both federal and state claims if they contain "substantially the same elements," otherwise to carve out the federal claim for trial), *but see, Liskey*, 717 F.2d at 320 n.8a.

substantially identical, factual questions. *See Cunningham v. Dean Witter Reynolds, Inc.*, 550 F.Supp. at 582-585. The 1925 Arbitration Act certainly did not anticipate the Supreme Court's 1953 determination that the protective intent of federal securities laws was to take priority over the economic advantages of arbitration. *Wilko v. Swan, supra.* Therefore, when there are arbitrable and nonarbitrable claims arising out of the same transaction, the district court should have discretion to evaluate the degree to which the claims are intertwined. If the district court determines that they are so intertwined that the purposes of the Arbitration Act and the protective intent of the federal securities laws would be frustrated by separating the claims, then it should refuse to separate them.

In this case the pendent and federal claims depend on substantially the same factual issues. Therefore the trial court's order properly refused the stay.

Affirmed.

APPENDIX B.

Order Denying Motion for Orders (1) Severing the Pending Claims and Compelling Arbitration Thereof, and (2) Staying Such Arbitration Pending Resolution of This Action.

United States District Court, Southern District of California.

A. Lamar Byrd, Plaintiff, vs. Dean Witter, Reynolds, Inc. a Delaware Corporation, Defendant. No. 82-1655-T(H).

Filed: March 9, 1983.

The Motion of defendant, DEAN WITTER, REYNOLDS, INC., for Orders (1) severing the pendent claims and compelling arbitration thereof and (2) staying such arbitration pending resolution of this action came on regularly for hearing on February 15, 1983 at 10:30 A.M. in Courtroom 2 of the above-entitled Court, the Honorable HOWARD B. TURRENTINE, Judge Presiding. EUGENE W. BELL, ESQ. of JONES, BELL, SIMPSON & ABBOTT appeared as counsel for defendant and ERIC V. BENHAM, ESQ., of SULLIVAN, DELAFIELD, McGRATH & McDONALD, appeared as counsel for plaintiff.

The Court having considered the moving and responding papers and the argument of counsel and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant's Motion for Orders (1) Severing the pendent claims and compelling arbitration thereof and

(2) staying such arbitration pending the resolution of this action be, and the same hereby is, denied.

Dated:

/s/ Howard B. Turrentine,
HOWARD B. TURRENTINE
United States District Judge

APPROVED AS TO FORM:

JONES, BELL, SIMPSON & ABBOTT

By: /s/ Eugene W. Bell
EUGENE W. BELL, Esq.
Attorney for Defendant

APPENDIX C.

Customer's Agreement.

[Letterhead]

DEAN WITTER REYNOLDS INC.

OFFICE: 288; ACCOUNT No.: 33001; A.E.: 77.

CUSTOMER'S AGREEMENT

Gentlemen:

In consideration of your accepting one or more accounts of the undersigned (whether designated by name, number or otherwise) and your agreeing to act as brokers for the undersigned in the purchase or sale of securities or commodities, the undersigned agrees as follows:

1. All transactions under this agreement shall be subject to the constitution, rules, regulations, customs and usages of the exchange or market, and its clearing house, if any, where the transactions are executed by you or your agents, and, where applicable, to the provisions of the Securities Exchange Act of 1934, the Commodities Exchange Act, and present and future acts amendatory thereof and supplemental thereto, and the rules and regulations of the Federal Securities and Exchange Commission, the Board of Governors of the Federal Reserve System and of the Secretary of Agriculture in so far as they may be applicable.

2. Whenever any statute shall be enacted which shall affect in any manner or be inconsistent with any of the provisions hereof, or whenever any rule or regulation shall be prescribed or promulgated by the New York Stock Exchange, the Federal Securities and Exchange Commission, the Board of Governors of the Federal Reserve System and/or the Secretary of Agriculture which shall affect in any manner or be inconsistent with any of the provisions hereof, the provisions of this agreement so affected shall be deemed

modified or superseded, as the case may be, by such statute, rule or regulation, and all other provisions of the agreement and the provisions as so modified or superseded, shall in all respects continue and be in full f ce and effect.

3. Except as herein otherwise e ssly provided, no provision of this agreement shall in a espect be waived, altered, modified or amended unless suc waiver, alteration, modification or amendment be committed to writing and signed by a member of your organization.

4. All monies, securities, commodities or other property which you may at any time be carrying for the undersigned or which may at any time be in your possession for any purpose, including safekeeping, shall be subject to a general lien for the discharge of all obligations of the undersigned to you, irrespective of whether or not you have made advances in connection with such securities, commodities or other property, and irrespective of the number of accounts the undersigned may have with you.

5. All securities and commodities or any other property, now or hereafter held by you, or carried by you for the undersigned (either individually or jointly with others), or deposited to secure the same, may from time to time and without notice to me, be carried in your general loans and may be pledged, re-pledged, hypothecated or re-hypothecated, separately or in common with other securities and commodities or any other property, for the sum due to you thereon or for a greater sum and without retaining in your possession and control for delivery a like amount of similar securities or commodities.

6. Debit balances of the accounts of the undersigned shall be charged with interest, in accordance with your usual custom, and with any increase in rates caused by money market conditions, and with such other charges as you may

make to cover your facilities and extra services.

7. You are hereby authorized, in your discretion, should the undersigned die or should you for any reason whatsoever deem it necessary for your protection, to sell any or all of the securities and commodities or other property which may be in your possession or which you may be carrying for the undersigned (either individually or jointly with others), or to buy in any securities, commodities or other property of which the account or accounts of the undersigned may be short, or cancel any outstanding orders in order to close out the account or accounts of the undersigned in whole or in part or in order to close out any commitment made in behalf of the undersigned. Such sale, purchase or cancellation may be made according to your judgment and may be made, at your discretion, on the exchange or other market where such business is then usually transacted, or at public auction or at private sale, without advertising the same and without notice to the undersigned or to the personal representatives of the undersigned, and without prior tender, demand or call of any kind upon the undersigned or upon the personal representatives of the undersigned, and you may purchase the whole or any part thereof free from any right of redemption, and the undersigned shall remain liable for any deficiency; it being understood that a prior tender, demand or call of any kind from you, or prior notice from you, of the time and place of such sale or purchase shall not be considered a waiver of your right to sell or buy any securities and/or commodities and/or other property held by you, or owed you by the undersigned, at any time as hereinbefore provided.

8. The undersigned will at all times maintain margins for said accounts, as required by you from time to time.

9. The undersigned undertakes, at any time upon your demand, to discharge obligations of the undersigned to you,

or, in the event of a closing of any account of the undersigned in whole or in part, to pay you the deficiency, if any, and no oral agreement or instructions to the contrary shall be recognized or enforceable.

10. In case of the sale of any security, commodity, or other property by you at the direction of the undersigned and your inability to deliver the same to the purchaser by reason of failure of the undersigned to supply you therewith, then and in such event, the undersigned authorizes you to borrow any security, commodity, or other property necessary to make delivery thereof, and the undersigned hereby agrees to be responsible for any loss which you may sustain thereby and any premiums which you may be required to pay thereon, and for any loss which you may sustain by reason of your inability to borrow the security, commodity, or other property sold.

11. At any time and from time to time, in your discretion, you may without notice to the undersigned apply and/or transfer any or all monies, securities, commodities and/or other property of the undersigned interchangeably between any accounts of the undersigned (other than from Regulated Commodity Accounts).

12. It is understood and agreed that the undersigned, when placing with you any sell order for short account, will designate it as such and hereby authorizes you to mark such order as being "short", and when placing with you any order for long account, will designate it as such and hereby authorizes you to mark such order as being "long". Any sell order which the undersigned shall designate as being for long account as above provided, is for securities then owned by the undersigned and, if such securities are not then deliverable by you from any account of the undersigned, the placing of such order shall constitute a representation by the undersigned that it is impracticable for him

then to deliver such securities to you but that he will deliver them as soon as it is possible for him to do so without undue inconvenience or expense.

13. In all transactions between you and the undersigned, the undersigned understands that you are acting as the brokers of the undersigned, except when you disclose to the undersigned in writing at or before the completion of a particular transaction that you are acting, with respect to such transaction, as dealers for your own account or as brokers for some other person.

14. Reports of the execution of orders and statements of the accounts of the undersigned shall be conclusive if not objected to in writing, the former within two days, and the latter within ten days, after forwarding by you to the undersigned by mail or otherwise.

15. Communications may be sent to the undersigned at the address of the undersigned given below, or at such other address as the undersigned may hereafter give you in writing, and all communications so sent, whether by mail, telegraph, messenger or otherwise, shall be deemed given to the undersigned personally, whether actually received or not.

16. Any controversy between you and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of either the Arbitration Committee of the Chamber of Commerce of the State of New York, or the American Arbitration Association, or the Board of Arbitration of the New York Stock Exchange, as the undersigned may elect. If the undersigned does not make such election by registered mail addressed to you at your main office within five (5) days after receipt of notification from you requesting such election, then the undersigned authorizes

you to make such election in behalf of the undersigned. Any arbitration hereunder shall be before at least three arbitrators and the award of the arbitrators, or of a majority of them, shall be final, and judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.

17. This agreement and its enforcement shall be governed by the laws of the State of New York and its provisions shall be continuous; shall cover individually and collectively all accounts which the undersigned may open or re-open with you, and shall enure to the benefit of your present organization, and any successor organization, irrespective of any change or changes at any time in the personnel thereof, for any cause whatsoever, and of the assigns of your present organization or any successor organization, and shall be binding upon the undersigned and/or the estate, executors, administrators and assigns of the undersigned.

18. The undersigned, if an individual, represents that the undersigned is of full age, that the undersigned is not an employee of any exchange, or of any corporation of which any exchange owns a majority of the capital stock, or of a member of any exchange, or of a member firm or member corporation registered on any exchange, or of a bank, trust company, insurance company or of any corporation, firm or individual engaged in the business of dealing, either as broker or as principal, in securities, bills of exchange, acceptances or other forms of commercial paper. The undersigned further represents that no one except the undersigned (and, to the extent community property stands in the account or accounts, his or her spouse) has an interest in the account or accounts of the undersigned with you.

19. The undersigned acknowledges receipt of your statement of interest charges.

Dated, 8-22-81 Jamul, CA 92035.

Very truly yours,

/s/ A. Lamar Byrd

CUSTOMER'S LOAN CONSENT

Until you receive written notice of revocation from the undersigned, you are hereby authorized to lend, to yourselves as brokers or to others, any securities held by you on margin for the account of, or under the control of, the undersigned.

Dated, 8/22/81 Jamul, CA 92035.

/s/ A. Lamar Byrd

RESPONDENT'S

BRIEF

Office - Supreme Court, U.S.
FILED
MAY 17 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1708

In The

Supreme Court of the United States

October Term, 1983

DEAN WITTER, REYNOLDS, INC.

Petitioner,

vs.

A. LAMAR BYRD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ERIC V. BENHAM
Counsel of Record
DONALD MCGRATH II
SULLIVAN, DELAFIELD, MCGRATH & MCDONALD
1200 Third Avenue, Suite 1405
San Diego, CA 92101
Telephone: (619) 234-6781

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED

I. In a case containing non-arbitrable claims brought under the federal securities laws does the District Court have discretion to deny arbitration of pendent claims having the same factual basis.

II. Did the District Court properly exercise its discretion to deny arbitration of pendent claims which are factually identical to a non-arbitrable federal securities claim where arbitration would be inefficient and duplicative and might adversely affect implementation of the federal securities laws.

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No. 83-1708

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A. LAMAR BYRD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, A. LAMAR BYRD, respectfully requests that this court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 726 F. 2d. 552.

STATEMENT OF THE CASE

A. Nature of the Case.

This case arises out of the acts of DEAN WITTER, REYNOLDS, INC. and its agents regarding the investment account of plaintiff, A. LAMAR BYRD.

On December 1, 1982, DR. BYRD filed his Complaint alleging facts stating claims for relief under the Securities Exchange Act of 1934, 15 U.S.C. §78a, *et seq.*, the securities laws of the state of California, common law fraud, breach of fiduciary duty and negligent management. 1 C. R.

B. Course of Proceedings and Disposition in the Court Below.

On February 14, 1983, DEAN WITTER, REYNOLDS, INC. (hereinafter referred to as "DEAN WITTER") moved the District Court for an order to sever plaintiff's pendent state law claims and compel their arbitration. Defendant's motion also sought to stay the arbitration of the pendent state law claims until litigation of the federal securities claim was concluded. 4 C.R. By its order entered March 14, 1983, the United States District Court denied defendant's motion in its entirety. 11 C. R. The order of the District Court was affirmed by the United States Court of Appeals for the Ninth Circuit on February 27, 1984.

C. Statement of Facts.

The defendant, DEAN WITTER, is a securities broker-dealer. In early 1981, JOHN DOUGLAS GALE (hereinafter referred to as "GALE") an agent and em-

ployee of the defendant DEAN WITTER, represented to BYRD that if BYRD sold his dental practice and allowed GALE to invest the $160,000 in proceeds in securities through DEAN WITTER, that GALE could provide plaintiff with a regular monthly income of $4,000. In reliance on this representation, BYRD sold his dental practice and invested $160,000 with DEAN WITTER. GALE altered a Client Information form to misrepresent BYRD's investment objectives and his qualifications to invest in speculative investments.

Starting in September, 1981, GALE began trading plaintiff's account in "uncovered" or "naked" options. Between September, 1981 and March, 1982 GALE traded in such securities without the prior consent of plaintiff and he treated plaintiff's account as a "discretionary" account, even though GALE had no written authority granting DEAN WITTER discretion to purchase and sell securities on behalf of plaintiff without his prior approval. Between September, 1981 and March, 1982, GALE engaged in an excessive number of purchases and sales of option contracts resulting in a "churning" of BYRD'S account. GALE represented to BYRD that he should pay no attention to the monthly statements received from DEAN WITTER since such statements did not accurately reflect the status of his account. GALE affirmatively represented to BYRD that trading in his account was generating a profit when in fact his account had suffered a loss of more than $100,000. When BYRD asked DEAN WITTER'S branch manager to examine GALE'S handling of the account, BYRD was assured that the account was being handled properly and was encouraged to retain GALE as his account executive.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The Court Below Fully Considered and Correctly Decided the Issues.

A. The District Court has Discretion to Retain Jurisdiction of Pendent Claims which are Factually Identical to Non-arbitrable Federal Securities' Claims.

The Court of Appeals held that where a non-arbitrable federal securities' claim and otherwise arbitrable pendent state claims in a Complaint are based on identical facts, the District Court has discretion to deny arbitration of the pendent claims to prevent inefficiency and duplication and to further the goals of protective federal legislation. A significant majority of courts addressing this issue have agreed. Specifically, the United States Courts of Appeal for the Fifth[1], and Eleventh[2] Circuits and District Courts in the Second[3], Third,[4], Eighth[5] and Tenth[6] Circuits have refused to mandate severence and separate arbitration without considering the attendant circumstances.

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[1]*Miley v. Oppenheimer & Co.*, 637 F.2d 318 (5th Cir. 1981).

[2]*Merrill, Lynch, Pierce, Fenner & Smith v. Haydu*, 625 F. 2d 1169 (11th Cir. 1982).

[3]*Fox v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 453 F. Supp. 561 (S.D.N.Y. 1978).

[4]*Breyer v. First Natl. Monetary Corp.*, 548 F. Supp. 955 (D.N.J. 1982).

[5]*Surman v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 599 F. Supp. 380 (E.D. Mo. 1983).

[6]*Lane v. Dean Witter, Reynolds, Inc.*, 505 F. Supp. 610 (W.D. Okla. 1980).

The Courts of Appeal in the Seventh Circuit[7] and more recently in the Sixth Circuit[8] have held that the United States Arbitration Act, 9 U.S.C. §1 divests the district courts of any discretion regarding arbitration in cases containing both arbitrable and non-arbitrable claims.

B. The Arbitration Act Does Not Mandate the Separate Resolution of Arbitrable and Non-Abitrable Claims.

Petitioner relies on the United States Arbitration Act, 9 U.S.C. §1 *et seq.* for its contention that the District Court lacks discretion to retain jurisdiction of a case with both arbitrable and non-arbitrable claims. It contends that by virtue of that legislation, arbitrable claims must be severed and separately arbitrated without consideration of the attendant circumstances.

The Arbitration Act, however, does not address the problem of cases mixing arbitrable and non-arbitrable claims and certainly does not expressly forbid courts to hear arbitrable claims in the context of a mixed claims case. *Cunningham v. Dean Witter, Reynolds, Inc.*, 550 F. Supp. 578, 583 (E.D. Cal. 1982).

Prior to the enactment of the Arbitration Act of 1925, Courts typically refused to enforce arbitration agreements because they constituted an ouster of the court's jurisdiction. In enacting the Arbitration Act, Congress intended ". . . to place arbitration agreements upon the same footing as other contracts." *Scherk v. Alberto-Culver Co.*,

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[7]*Dickinson v. Heinold Securities, Inc.*, 661 F. 2d 638 (7th Cir. 1981).

[8]*Liskey v. Oppenheimer & Co.*, 717 F. 2d 314 (6th Cir. 1983).

417 U.S. 506, 511, 94 S. Ct. 2449, 2453, 41 L. Ed. 2d 270 (1974) (*quoting* H. R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924)).

By virtue of the Arbitration Act, agreements to arbitrate are not per se unenforceable. It does not follow that such agreements are enforceable in all circumstances and that courts lack discretion to deny arbitration where it would conflict with other federal policies or where the benefits of arbitration cannot be realized.

Legislation should be construed so as to further the goals expressed by Congress as the basis for enactment of the legislation. *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341, 349, 88 S.Ct. 904, 908, 19 L.Ed.2d 1222 (1968). An interpretation which frustrates fulfillment of the legislative intent should be avoided. *National Petroleum Refiners' Association v. F.T.C.*, 482 F. 2d 672, 689 (D.C. Cir. 1973).

By permitting the enforcement of arbitration agreements, Congress hoped "[t]o avoid the delay and expense of litigation." S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924). However, in a case mixing arbitrable and non-arbitrable claims, to compel arbitration would cause delay, inefficiency and additional expense. Thus, compelled arbitration of respondent's pendent claims runs counter to the legislative goal of arbitration.

Furthermore, exceptions to the enforceability of arbitration agreements have been created in the circumstance of certain protective legislation. In *Wilco v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed 168 (1953), the Supreme Court faced an effort to compel arbitration of claims

brought under the Securities Act of 1933. The Court held that the policy of protecting investors expressed in the Securities Act outweighed the more general policy favoring economical, expeditious litigation. The agreement was, therefore, invalidated.

Likewise, arbitration of claims based on the Securities Exchange Act of 1934 is not compelled. *DeLancie v. Birr, Wilson and Co.*, 648 F.2d 1255, 1258 (9th Cir. 1981); *Sibley v. Tandy Corp.*, 543 F. 2d 540, 543 (5th Cir. 1976).

Wilco v. Swan, supra, involved a balancing of competing values: Prompt and economical resolution of disputes through arbitration versus promotion of the effective implementation of federal protective legislation. However, in a mixed claims case severance and separate arbitration of the pendent claims will cause delay, inefficiency and additional expense and it may also impact on implementation of the federal securities laws. A plaintiff with limited resources may have to choose to forego either the federal securities action in federal court or the state law claim subject to arbitration because he cannot afford to prosecute two separate actions. In this case, both considerations of economy and of effective implementation of the securities laws militate against severance and separate arbitration of the pendent claims.

The Arbitration Act does not expressly require severance and arbitration of claims in the context of a case containing mixed arbitrable and non-arbitrable claims. Nor should such a requirement be implied where, as here, the requirement is contrary to the express congressional objective in enacting the legislation. Therefore, the grant or denial of defendant's motion to sever the pendent state

law claims and to compel their arbitration is properly a matter within the sound discretion of the trial court.

II.

The Decision of the Court of Appeal Does Not Require an Exercise of This Court's Power of Supervision.

Petitioner invokes the Supreme Court's supervisory power over lower federal courts based on the contention that the decision of the court below conflicts with two recent decisions of the Supreme Court. However, the cases cited by petitioner are distinguishable from the case at bench. *Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.*, — U.S. —, 103 S.Ct. 927, 74 L.Ed. 2d 765 (1983) has some facial similarity in that it involved bifurcation of an action with certain claims sent to arbitration. However, the claims in *Cone* were not factually or legally "intertwined"; but rather involved different defendants with different contractual obligations. Also, unlike *Cone*, this case does not involve an arbitration agreement freely negotiated between parties of equal bargaining power. Rather, it involves an adhesive contractual term imposed on respondent as a condition of his access to the financial markets. Most importantly, the *Cone* case did not involve interference with implementation of federal protective legislation.

Southland Corp. v. Keating, — U.S. —, 104 S.Ct. 852, 79 L.Ed 2d 1 (1984) is similarily distinguishable. It is primarily a case involving the supremacy of federal legislation in the face of competing state statutes. The decision reached by the Ninth Circuit in this case may be reconciled with the Supreme Court's decisions in both

Keating and *Cone* and does not require an exercise of this Court's power of supervision.

CONCLUSION

This case was correctly decided by the Court of Appeals for the Ninth Circuit. The decision does not conflict with decisions of the Supreme Court and does not require an exercise of the Court's power of supervision. For these reasons, respondent respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

DATED: May 15, 1984

Respectfully submitted,

ERIC V. BENHAM
Counsel of Record

DONALD MCGRATH II
1200 Third Avenue, Suite 1405
San Diego, CA 92101
Counsel for Respondent

REPLY

BRIEF

Office-Supreme Court, U.S.
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CLERK

No. 83-1708

IN THE

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Petitioner,

vs.

A. LAMAR BYRD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY MEMORANDUM FOR THE PETITIONER.

EUGENE W. BELL,
JONES, BELL, SIMPSON & ABBOTT,
A member of the Bar of the
Supreme Court and Counsel of
Record for Petitioner; and

KEVIN K. FITZGERALD,
JONES, BELL, SIMPSON & ABBOTT,
800 Wilshire Boulevard,
Fifth Floor,
Los Angeles, Calif. 90017,
(213) 485-1555,

Attorneys for Petitioner.

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No. 83-1708

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vs.

A. LAMAR BYRD,

Respondent.

REPLY MEMORANDUM FOR THE PETITIONER.

I.
Introduction.

Petitioner Dean Witter Reynolds Inc. (hereinafter "petitioner") seeks review by writ of certiorari to the United States Court of Appeals for the Ninth Circuit of the denial of arbitration of state claims pendent to a federal securities claim. Petitioner contends that the court of appeals erred in not ordering the pendent state claims to arbitration and staying arbitration pending judicial resolution of the federal securities claim.

In his Brief in Opposition to issuance of such a writ, respondent A. Lamar Byrd (hereinafter "respondent") raises two arguments not addressed in the Memorandum for the Petitioner. These arguments are considered *infra*. In addition, this Reply references pertinent new case authority not available at the time of filing of the Memorandum for the Petitioner.

II.

The Conflict Among the Circuits Has Increased.

In his opposing brief, respondent attempts to downplay the conflict among the circuit courts of appeals on the instant issue by contending that a significant majority of courts have agreed that district courts should have discretion to retain clearly arbitrable pendent state claims for judicial resolution with nonarbitrable federal securities claims. Respondent cites district court decisions within the Second, Third, Eighth, and Tenth Circuits in accord with his position, implying that there is agreement on the issue among the district courts of those Circuits.

Not only are there district court decisions in a number of those Circuits in accord with petitioner's position on the instant issue,[1] but the district court decision in the Eighth Circuit cited by respondent, *Surman v. Merrill Lynch, Pierce, Fenner & Smith*,[2] was just reversed by the Eighth Circuit.[3] The *Surman* decision constitutes pertinent new authority which exacerbates the split among the circuit courts of appeals on the instant issue. Thus, the need for review by this Court in order to establish uniformity in construction and application of federal law with respect to the instant issue has increased since the filing of the Memorandum for the Petitioner.

---

[1] *See, e.g., Pross v. Baird, Patrick & Co., Inc.*, [1983-84 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶99,438 (S.D.N.Y. August 1, 1983); *Todd v. Oppenheimer & Co., Inc.*, 78 F.R.D. 415 (S.D.N.Y. 1978); *Ging v. Parker Hunter Inc.*, 544 F.Supp. 49 (W.D.Pa. 1982).

[2] 559 F.Supp. 388 (E.D.Mo. 1984).

[3] *Surman v. Merrill Lynch, Pierce, Fenner & Smith*, No. 83-1455 (8th Cir. April 24, 1984) (available on LEXIS, Genfed library Cir. file). The *Surman* decision had not been rendered at the time of filing of the Memorandum for the Petitioner.

III.

Wilko v. Swan Is Not Controlling in This Case.

Respondent's primary ground for opposing the petition for writ of certiorari in the instant case is his assertion that the holding of the Ninth Circuit was correct. In support of this assertion, respondent devotes the bulk of his opposition to a discussion of the merits of the instant case.[4] A misleading aspect of this discussion, however, is respondent's contention that the instant case is analogous to and requires the same analysis as this Court's decision in *Wilko v. Swan*.[5] Respondent asserts: "*Wilco* [sic] *v. Swan, supra,* involved a balancing of competing values: Prompt and economical resolution of disputes through arbitration versus promotion of the effective implementation of federal protective legislation. . . . In this case, both considerations of economy and of effective implementation of the securities laws militate against severance and separate arbitration of the pendent claims."[6]

Respondent neglects to note that policy considerations were analyzed by the Court in *Wilko* in the context and because of a perceived conflict between two express statutory provisions: section 2 of the United States Arbitration Act,[7] providing for the enforceability of agreements to arbitrate, and section 14 of the Securities Act of 1933,[8] declaring void any stipulation waiving compliance with any provision of the Securities Act. No such statutory conflict exists in the instant case. Arbitration of clearly arbitrable pendent state claims was denied in the

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[4] Brief in Opposition, pp. 4-8.

[5] 346 U.S. 427 (1953).

[6] Brief in Opposition, p. 7.

[7] 9 U.S.C. § 2.

[8] 15 U.S.C. § 77n.

instant case not as a result of statutory directive, but due to the Ninth Circuit's adoption and application of a judicially created doctrine established by the Fifth Circuit, the "doctrine of intertwining."[9]

While respondent asserts that a writ of certiorari should be denied in the instant case because the decision of the Ninth Circuit was correct, petitioner contends that the Ninth Circuit has denied enforcement of the statutory mandate of the United States Arbitration Act by applying a judicially created doctrine of dubious merit, the "intertwining" doctrine. Petitioner therefore contends that the nature of the Ninth Circuit's holding warrants review by this Court.

IV.
Conclusion.

The recent Eighth Circuit decision in *Surman v. Merrill Lynch, Pierce, Fenner & Smith*[10] has increased the conflict among the circuit courts of appeals on the instant issue, thereby increasing the need for review by this Court to promote uniform application of federal law. Further, the position of the Ninth and Fifth Circuits on the instant issue applying the judicially created intertwining doctrine contravenes the express mandate of the United States Arbitration Act. Petitioner submits that the respondent has not presented any compelling reason for a denial of a writ of certiorari and therefore respectfully requests that its petition for a writ of certiorari to

[9]*See, e.g., Miley v. Oppenheimer & Co.*, 637 F.2d 318, 335 (5th Cir. 1981); *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977).

[10]No. 83-1455 (8th Cir. April 24, 1984).

the United States Court of Appeals for the Ninth Circuit be granted.

DATED: May 21, 1984.

Respectfully submitted,

EUGENE W. BELL,
JONES, BELL, SIMPSON & ABBOTT,
A member of the Bar of the
Supreme Court and Counsel of
Record for Petitioner; and

KEVIN K. FITZGERALD,
JONES, BELL, SIMPSON & ABBOTT,
Attorneys for Petitioner.

JOINT

APPENDIX

Office - Supreme Court, U.S.
FILED
JUL 26 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1708

IN THE

Supreme Court of the United States

October Term, 1983

DEAN WITTER REYNOLDS INC.,

Petitioner,

vs.

A. LAMAR BYRD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JOINT APPENDIX.

EUGENE W. BELL,
Counsel of Record; and
KEVIN K. FITZGERALD,
JONES, BELL, SIMPSON & ABBOTT,
800 Wilshire Boulevard,
Fifth Floor,
Los Angeles, Calif. 90017,
(213) 485-1555,
Attorneys for Petitioner.

ERIC V. BENHAM,
Counsel of Record; and
DONALD McGRATH II,
SULLIVAN, DELAFIELD, McGRATH & McDONALD,
1200 Third Avenue,
Suite 1405,
San Diego, Calif. 92101,
(619) 234-6781,
Attorneys for Respondent.

PETITION FOR CERTIORARI FILED APRIL 19, 1984
CERTIORARI GRANTED JUNE 11, 1984

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Chronological List of Relevant Docket Entries.

December 1, 1982 — Plaintiff Byrd's Complaint and Demand for Jury Trial filed in the United States District Court for the Southern District of California.

January 11, 1983 — Defendant Dean Witter's Notice of Motion, Motion, and Memorandum of Points and Authorities in Support of Motion for Order (1) Severing the Pendent Claims and Compelling Arbitration thereof and (2) Staying such Arbitration Pending Resolution of the Action filed.

February 7, 1983 — Plaintiff Byrd's Memorandum of Points and Authorities in Opposition to Motion filed.

February 8, 1983 — Defendant Dean Witter's Reply to Plaintiff's Opposition to Motion to Arbitrate filed.

March 14, 1983 — Order entered denying Motion of Defendant Dean Witter for Order (1) Severing the Pendent Claims and Compelling Arbitration thereof and (2) Staying such Arbitration Pending Resolution of the Action.

March 15, 1983 — Defendant Dean Witter's Notice of Appeal filed.

February 20, 1984 — Opinion of the United States Court of Appeals for the Ninth Circuit filed and entered.

Complaint for Money Damages and Demand for Jury Trial.

United States District Court, Southern District of California.

A. Lamar Byrd, Plaintiff, vs. Dean Witter Reynolds, Inc., a Delaware Corporation Defendant. No. 82-1655-K(H).

Filed: December 1, 1982.

Plaintiff, A. LAMAR BYRD, (hereinafter referred to as "BYRD") brings a civil action against defendant, DEAN WITTER REYNOLDS, INC., a Delaware Corporation (hereinafter referred to as "DEAN WITTER") and alleges as follows:

JURISIDICTION AND VENUE

1. This action arises under §10(b) and 15c and 20 of the Securities Exchange Act of 1934 as amended, 15 U.S.C. §§78 j (b), 17 o (c) and 78 t, California Corporations Code §§25401, 25501 and 25504, and certain common law theories.

2. In doing the acts alleged herein DEAN WITTER made use of the means and instrumentalities of interstate commerce and of the United States mails.

3. This Court has jurisdiction of this action under the provisions of § 27 of the Securities and Exchange Act of 1934 15 U.S.C. § 78(a), 28 U.S.C. § 1331(a) and 1332(a), and by virtue of its pendant jurisdiction over non-Federal claims arising from the same facts as the Federal causes of action. This controversy exceeds the sum of $10,000 exclusive of interest and costs.

4. Venue is properly laid in this District by virtue of 18 U.S.C. § 1391(b) since defendant DEAN WITTER does business in this District and the claim arose in this District.

THE PARTIES

5. Plaintiff BYRD is an individual who resides in San Diego County, California and is a citizen of the State of California.

6. Defendant DEAN WITTER is a Delaware Corporation authorized to do business, and doing business in the Southern District of California as a securities broker-dealer.

FACTUAL BACKGROUND APPLICABLE TO ALL COUNTS

7. At all times herein mentioned JOHN DOUGLAS GALE (hereinafter referred to as "GALE"), was an agent and employee of defendant DEAN WITTER, and account executive of plaintiff's account with DEAN WITTER.

8. At all times herein mentioned JOHN VAN POZNAK (hereinafter referred to as "VAN POZNAK") was an agent and employee of defendant DEAN WITTER and together with GALE was account executive of plaintiff's account with DEAN WITTER.

9. At all times herein mentioned C. T. KUECHLER (hereinafter referred to as "KUECHLER") was the registered options principal for DEAN WITTER and was branch manager of the Mission Valley branch of DEAN WITTER at which account executives GALE and VAN POZNAK were employed.

10. In early 1981 GALE represented to BYRD that if BYRD sold his dental practice and allowed GALE to invest the proceeds in securities through DEAN WITTER that GALE could provide plaintiff with a regular monthly income. GALE further represented that if BYRD invested $160,000 in securities through DEAN WITTER that GALE could provide BYRD with a regular monthly income of $4,000.

11. In reliance upon the representations and statements set forth in paragraph 10 hereof BYRD agreed to and did retain DEAN WITTER as his investment advisor and broker and (b) invest $160,000 with DEAN WITTER.

12. On April 7, 1981 GALE requested plaintiff complete and sign a form entitled "Client Option Information". BYRD filled out that form indicating that his investment objectives were "income" and "investment hedge" and limiting defendant's trading authority to "covered call writing only" and "purchasing options". Plaintiff is informed and believes and on such information and belief alleges that at the same time and place GALE had plaintiff sign a second form in blank without any designation of investment objectives and strategies. Plaintiff is further informed and believes and on such information and belief alleges that on or about August 28, 1981 and without the knowledge or consent of BYRD the second form was filled out to indicate that plaintiff's investment objectives were first "speculative income" and second "investment hedge" and placing no limitation on the investment strategies to be used by defendant. That client option information form dated August 28, 1981 further represents that BYRD is self-employed as a dentist, that his approximate annual income from all sources is $72,000 and that BYRD's approximate net worth excluding residence is $5,000,000.00, and that BYRD's approximate liquid net worth is $250,000. The true facts are that BYRD was retired and his approximate annual income from all sources was about $14,000, his approximate net worth was $500,000, and approximate liquid net worth of was that sum invested with defendant DEAN WITTER.

13. The client option information form dated August 28, 1981 was prepared and signed by GALE and VAN POZNAK and approved by KUECHLER.

14. Starting in September, 1981, GALE began trading plaintiff's account in uncovered or "naked" options. Between September, 1981 and March, 1982, GALE traded in such securities without the prior consent of plaintiff and he treated plaintiff's account as a "discretionary" account. GALE never had written authority granting DEAN WITTER discretion to purchase and sell securities on behalf of plaintiff without his prior consent.

15. Between September, 1981 and March, 1982 GALE engaged in an excessive number of transactions for the purchase and sale of options contracts resulting in a "churning" of his account. The churning of plaintiff's account resulted in an excessively high turnover ratio between September, 1981 and May, 1982. DEAN WITTER's account executive earned about $26,000 in commissions from these transactions. In this period plaintiff's initial account valued in excess of $160,000 was depleted by about $128,000.

16. In September, 1981 and March, 1982, GALE represented to BYRD that he should pay no attention to the monthly statements received from DEAN WITTER because such statements did not accurately reflect his account.

17. On November 3, 1981 GALE prepared for BYRD a statement of status of BYRD's account. That statement represented that the current market value of securities in plaintiff's account was $201,300 and that the gross amount available in such account was $174,206.25 and that the net profit to date from trading in such account was $33,533.25. Plaintiff is informed and believes and on such information and belief alleges that each of such statements was materially false and misleading in that the net value of plaintiff's account was substantially

less than represented and there was no net profit from trading in plaintiff's account.

18. Between September, 1981 and March, 1982 GALE further represented to BYRD that monies BYRD received each month from DEAN, WITTER in the sum of $4,000 per month between September and February and $3,000 per month in March represented profits from DEAN WITTER's trading in BYRD's account.

19. Plaintiff is informed and believes and on such information and belief alleges that such representations were false and that the true facts were that all monies sent to plaintiff were taken out of principal and that there were no net profits from trading in plaintiff's account.

20. In April 1982 BYRD asked KUECHLER to examine GALE's handling of BYRD's account. C. T. KUECHLER assured BYRD that his account was being handled properly and encouraged BYRD to retain GALE as his account executive.

21. In reliance upon the representations and statements set forth in Paragraphs 16-20 hereof, BYRD agreed to and did maintain DEAN WITTER as his investment advisors and brokers and did not discover that his account was substantially depleted until about June, 1982.

22. In doing the things herein alleged GALE acted with the knowledge, participation and ratification of DEAN WITTER.

23. In doing the things herein alleged DEAN WITTER acted with fraud, oppression and malice in conscious disregard for BYRD's rights.

COUNT ONE

(§10(b) 15 (c) and 20 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §§78 j(b) 78 0(c) and 78 t and S.E.C. Rule 10B-5)

24. Plaintiff repleads and realleges each allegation contained in paragraphs 1 through 23 above and incorporates the same herein by reference.

25. All the statements made by GALE as alleged hereinabove were known by GALE to be false and misleading when they were made, or were made recklessly for the express purpose of inducing BYRD to permit DEAN WITTER to buy and sell options contracts.

26. Each of the misrepresentations listed herein were material and BYRD would not have permitted DEAN WITTER to buy and sell options contracts in his behalf had he known the true facts.

27. The facts alleged herein constitute violations by DEAN WITTER of §§10(b) 15(c) and 20 of the Securities Exchange Act of 1934 and S.E.C. Rules 10 b-5 promulgated thereunder.

28. As a direct and proximate result of the acts, conduct and false and misleading statements of DEAN WITTER, BYRD has been damaged in an amount substantially in excess of $10,000 exclusive of interest and costs.

COUNT TWO

(California Corporations Code §§25401, 25501 and 25504)

29. The Court has pendant jurisdiction over this Count. Plaintiff repleads and realleges each allegation contained in Paragraph 1 through 28 of this Complaint and incorporates the same herein by reference.

30. DEAN WITTER induced BYRD to purchase and sell options contracts by means of false representations. These acts constitute violations by DEAN WITTER of §§25401, 25501 and 25504 of the California Corporations Code.

31. All of the statements made by DEAN WITTER as alleged hereinabove were known by DEAN WITTER to be false and misleading when they were made or were made recklessly. Such statements were made by DEAN WITTER for the express purpose of inducing BYRD to buy and sell options contracts.

32. As a direct and proximate result of the acts, conduct and false and misleading statements of DEAN WITTER, BYRD has been damaged in an amount substantially in excess of $10,000 exclusive of interest and costs.

COUNT THREE

(Fraud and Deceit)

33. The Court has pendant jurisidiction over this Count. Plaintiff repleads and realleges each and every allegation in Paragraphs 1 through 32 of this Complaint and incorporates the same herein by reference.

34. As a result of the transactions set forth hereinabove plaintiff is liable to BYRD for fraud and deceit.

35. As a direct and proximate result of the acts and conduct and false and misleading statements of DEAN WITTER, BYRD has been damaged in an amount substantially in excess of $10,000 exclusive of interest and costs.

COUNT FOUR

(Breach of Fiduciary Duty)

36. The Court has pendant jurisdiction over this Count. Plaintiff repleads and reallages each and every allegation in Paragraph 1 through 35 of this Complaint and incorporates the same herein by reference.

37. By reason of being a securities broker-dealer and serving as the agent and stock broker for BYRD, DEAN WITTER owed BYRD a fiduciary duty. DEAN WITTER breached this duty by excessive trading in BYRD's account for its own benefit, by gross mismanagement of BYRD's account and by misrepresenting to BYRD the status of his account.

38. As a direct and proximate result of DEAN WITTER's breach of fiduciary duty, BYRD has been damaged in an amount substantially in excess of $10,000 exclusive of interest and costs.

COUNT FIVE

(Negligent Mismanagement)

39. The Court has pendant jurisdiction over this Count. Plaintiff repleads and realleges each and every allegation of Paragraphs 1 through 38 of this Complaint and incorporates the same herein by reference.

40. As agent and stockbroker for BYRD, DEAN WITTER owed BYRD a duty to exercise reasonable care in the management and supervision of BYRD's account.

41. DEAN WITTER negligently managed and supervised the account of BYRD causing BYRD's account to lose value.

42. As a direct and proximate result of DEAN WITTER's negligent mismanagement of BYRD's account, BYRD has been damaged in an amount substantially in excess of $10,000 exclusive of interest and costs.

WHEREFORE, plaintiff prays for Judgment against DEAN WITTER as follows:

1. For actual damages to be proven at time of trial, together with pre-judgment and post-judgment interest as allowed by law;

2. For punitive damages in a sum sufficient to properly punish and make an example of DEAN WITTER;

3. For costs of suit and expenses including reasonable attorney's fees;

4. For such other and further relief as this Court deems just and equitable.

Dated: December 1, 1982

SULLIVAN, DELAFIELD,
McGRATH & McDONALD

/s/ By: ERIC V. BENHAM
ERIC V. BENHAM

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury.

Dated: December 1, 1982

SULLIVAN, DELAFIELD,
McGRATH & McDONALD

/s/ By: ERIC V. BENHAM
ERIC V. BENHAM

Notice of Motion for Order (1) Severing the Pendent Claims and Compelling Arbitration Thereof and (2) Staying Such Arbitration Pending Resolution of This Action. Date: February 14, 1983, Time: 10:30 A.M., Courtroom: 6, Hon. Judith N. Keep.

United States District Court, Central District of California.

A. Lamar Byrd, Plaintiff, vs. Dean Witter Reynolds Inc., a Delaware corporation, Defendant. No. 82-1655-K(H).

Filed: January 11, 1983.

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on February 14, 1983 at 10:30 A.M., or as soon thereafter as the matter may be heard, defendant DEAN WITTER REYNOLDS INC. will move the court for an order severing the pendent claims alleged by the plaintiff in his complaint which are set forth as the second through fifth claims, inclusive, and compelling arbitration of those claims and further an order staying such arbitration pending judicial resolution of the first claim which is based upon alleged violations of the Securities Exchange Act of 1934.

This motion will be based upon the grounds set forth in the accompanying motion.

DATED: January 7, 1983.

JONES, BELL, SIMPSON & ABBOTT

/s/ By EUGENE W. BELL
EUGENE W. BELL

Attorneys for Defendant
DEAN WITTER REYNOLDS INC.

Motion for Order (1) Severing the Pendent Claims and Compelling Arbitration Thereof and (2) Staying Such Arbitration Pending Resolution of This Action. Date: February 14, 1983, Time: 10:30 A.M., Courtroom: 6, Hon. Judith N. Keep.

United States District Court, Central District of California.

A. Lamar Byrd, Plaintiff, vs. Dean Witter Reynolds Inc., a Delaware corporation, Defendant. No. 82-1655-K(H).

Filed: January 11, 1983.

Defendant DEAN WITTER REYNOLDS INC. hereby moves the court for an order (i) severing the pendent claims and compelling arbitration thereof, and (ii) staying such arbitration pending judicial resolution of the claim founded upon alleged violations of the Securities Exchange Act of 1934. This motion is made on the following grounds:

1. Prior to the institution of this litigation the parties hereto have entered into written agreements which provide for arbitration of the disputes which are framed by the pendent claims asserted in the complaint.

2. Attached hereto and marked as Exhibit "A" is a copy of the "Customer's Agreement" entered into by and between the plaintiff A. LAMAR BYRD and the defendant DEAN WITTER REYNOLDS INC. in or about August, 1981 at the time the plaintiff opened an account with defendant. Paragraph 16 provides for arbitration of the disputes framed by the pendent claims.

3. The underlying transactions upon which the pendent claims are based involved commerce within the meanings of Sections 1 and 2 of Title 9 of the United States Code in that they relate to and concern the purchase and sale of securities on a national exchange.

4. The issues involved in the pendent claims are referable to arbitration under the agreement between the parties to this action.

This motion is based upon the pleadings filed herein, the accompanying Memorandum of Points and Authorities and such further oral and documentary evidence as is presented at the hearing on this motion.

DATED: January 7, 1983.

JONES, BELL, SIMPSON & ABBOTT

s/ By EUGENE W. BELL
EUGENE W. BELL

Attorneys for Defendants
DEAN WITTER REYNOLDS INC.

DEAN WITTER REYNOLDS INC.

Customer's Agreement

Gentlemen:

In consideration of your accepting one or more accounts of the undersigned (whether designated by name, number or otherwise) and your agreeing to act as brokers for the undersigned in the purchase or sale of securities or commodities, the undersigned agrees as follows:

1. All transactions under this agreement shall be subject to the constitution, rules, regulations, customs and usages of the exchange or market, and its clearing house, if any, where the transactions are executed by you or your agents, and where applicable, to the provisions of the Securities Exchange Act of 1934, the Commodities Exchange Act, and present and future acts amendatory thereof and supplemental thereto, and the rules and regulations of the Federal Securities and Exchange Commission, the Board of Governors of the Federal Reserve System and of the Secretary of Agriculture in so far as they may be applicable.

2. Whenever any statute shall be enacted which shall affect in any manner or be inconsistent with any of the provisions hereof, or whenever any rule or regulation shall be prescribed or promulgated by the New York Stock Exchange, the Federal Securities and Exchange Commission, the Board of Governors of the Federal Reserve System and/or the Secretary of Agriculture which shall affect in any manner or be inconsistent with any of the provisions hereof, the provisions of this Agreement so affected shall be deemed modified or superseded, as the case may be, by such statute, rule or regulation, and all other provisions of the agreement and the provisions as so modified or superseded, shall in all respects continue and be in full force and effect.

3. Except as herein otherwise expressly provided, no provision of this agreement shall in any respect be

waived, altered, modified or amended unless such waiver, alteration, modification or amendment be committed to writing and signed by a member of your organization.

4. All monies, securities, commodities or other property which you may at any time be carrying for the undersigned or which may at any time be in your possession for any purpose, including safekeeping, shall be subject to a general lien for the discharge of all obligations of the undersigned to you, irrespective of whether or not you have made advances in connection with such securities, commodities or other property, and irrespective of the number of accounts the undersigned may have with you.

5. All securities and commodities or any other property, now or hereafter held by you, or carried by you for the undersigned (either individually or jointly with others), or deposited to secure the same, may from time to time and without notice to me, be carried in your general loans and may be pledged, re-pledged, hypothecated or re-hypothecated, separately or in common with other securities and commodities or any other property, for the sum due to you thereon or for a greater sum and without retaining in your possession and control for delivery a like amount of similar securities or commodities.

6. Debit balances of the accounts of the undersigned shall be charged with interest in accordance with your usual custom, and with any increase in rates caused by money market conditions, and with such other charges as you may make to cover your facilities and extra services.

7. You are hereby authorized, in your discretion, should the undersigned die or should you for any reason whatsoever deem it necessary for your protection, to sell any or all of the securities and commodities or other property which may be in your possession or which you may be carrying for the undersigned (either individually

or jointly with others), or to buy in any securities, commodities or other property of which the account or accounts of the undersigned may be short, or cancel any outstanding orders in order to close out the account or accounts of the undersigned in whole or in part or in order to close out any commitment made in behalf of the undersigned. Such sale, purchase or cancellation may be made according to your judgment and may be made at your discretion, on the exchange or other market where such business is then usually transacted, or at public auction or at private sale, without advertising the same and without notice to the undersigned or to the personal representatives of the undersigned, and without prior tender, demand or call of any kind upon the undersigned or upon the personal representatives of the undersigned, and you may purchase the whole or any part thereof free from any right of redemption, and the undersigned shall remain liable for any deficiency; it being understood that a prior tender, demand or call of any kind from you, or prior notice from you, of the time and place of such sale or purchase shall not be considered a waiver of your right to sell or buy any securities and/or commodities and/or other property held by you, or owed you by the undersigned, at any time as hereinbefore provided.

8. The undersigned will at all times maintain margins for said accounts as required by you from time to time.

9. The undersigned undertakes at any time upon your demand to discharge obligations of the undersigned to you, or, in the event of a closing of any account of the undersigned in whole or in part, to pay you the deficiency, if any, and no oral agreement or instructions to the contrary shall be recognized or enforceable.

10. In case of the sale of any security, commodity, or other property by you at the direction of the undersigned and your inability to deliver the same to the purchaser by reason of failure of the undersigned to

supply you therewith, then and in such event, the undersigned authorizes you to borrow any security, commodity, or other property necessary to make delivery thereof, and the undersigned hereby agrees to be responsible for any loss which you may sustain thereby and any premiums which you may be required to pay thereon, and for any loss which you may sustain by reason of your inability to borrow the security, commodity, or other property sold.

11. At any time and from time to time, in your discretion, you may without notice to the undersigned apply and/or transfer any or all monies, securities, commodities and/or other property of the undersigned interchangeably between any accounts of the undersigned (other than from Regulated Commodity Accounts).

12. It is understood and agreed that the undersigned, when placing with you any sell order for short account, will designate it as such and hereby authorizes you to mark such order as being "short", and when placing with you any order for long account, will designate it as such and hereby authorizes you to mark such order as being "long." Any sell order which the undersigned shall designate as being for long account as above provided, is for securities then owned by the undersigned and, if such securities are not then deliverable by you from any account of the undersigned, the placing of such order shall constitute a representation by the undersigned that it is impracticable for him then to deliver such securities to you but that he will deliver them as soon as it is possible for him to do so without undue inconvenience or expense.

13. In all transactions between you and the undersigned, the undersigned understands that you are acting as the brokers of the undersigned, except when you disclose to the undersigned in writing at or before the completion of a particular transaction that you are acting with respect to such transaction, as dealers for your own account or as brokers for some other person.

14. Reports of the execution of orders and statements of the accounts of the undersigned shall be conclusive if not objected to in writing, the former within two days, and the latter within ten days, after forwarding by you to the undersigned by mail or otherwise.

15. Communications may be sent to the undersigned at the address of the undersigned given below, or at such other address as the undersigned may hereafter give you in writing, and all communications so sent, whether by mail, telegraph, messenger or otherwise, shall be deemed to be given to the undersigned personally, whether actually received or not.

16. Any controversy between you and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of either the Arbitration Committee of the Chamber of Commerce of the State of New York, or the American Arbitration Association, or the Board of Arbitration of the New York Stock Exchange, as the undersigned may elect. If the undersigned does not make such election by registered mail addressed to you at your main office within five (5) days after receipt of notification from you requesting such election, then the undersigned authorizes you to make such election in behalf of the undersigned. Any arbitration hereunder shall be before at least three arbitrators and the award of the arbitrators, or of a majority of them, shall be final, and judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.

17. This agreement and its enforcement shall be governed by the laws of the State of New York and its provisions shall be continuous; shall cover individually and collectively all accounts which the undersigned may open or re-open with you, and shall enure to the benefit of your present organization, and any successor organization, irrespective of any change or changes at any time in the personnel thereof, for any cause whatsoever, and

of the assigns of your present organization or any successor organization, and shall be binding upon the undersigned and/or the estate, executors, administrators and assigns of the undersigned.

18. The undersigned, if an individual, represents that the undersigned is of full age, that the undersigned is not an employee of any exchange, or of any corporation of which any exchange owns a majority of the capital stock, or of a member of any exchange, or of a member firm or member corporation registered on any exchange or of a bank, trust company, insurance company or of any corporation, firm or individual engaged in the business of dealing, either as broker or as principal, in securities, bills of exchange, acceptances or other forms of commercial paper. The undersigned further represents that no one except the undersigned (and, to the extent community property stands in the account or accounts, his or her spouse) has an interest in the account or accounts of the undersigned with you.

19. The undersigned acknowledges receipt of your statement of interest charges.

Very truly yours,
/s/ A. LAMAR BYRD

Dated, 8-22-81
Jamul, CA 92035

CUSTOMER'S LOAN CONSENT

Until you receive written notice of revocation from the undersigned, you are hereby authorized to lend, to yourselves as brokers or to others, any securities held by you on margin for the account of, or under the control of, the undersigned.

/s/ A. Lamar Byrd

Dated, 8-22-81
Jamul, CA 92035

Memorandum of Points and Authorities in Support of Motion for Order (1) Severing the Pendent Claims and Compelling Arbitration Thereof and (2) Staying Such Arbitration Pending Resolution of This Action. Date: February 14, 1983, Time: 10:30 A.M., Courtroom 6, Hon. Judith N. Keep.

United States District Court, Central District of California.

A. Lamar Byrd, Plaintiff, vs. Dean Witter Reynolds Inc., a Delaware corporation, Defendant. No. CV 82-1655-K(H).

Filed: January 11, 1983.

I. INTRODUCTORY STATEMENT

This action grows out of a garden variety dispute between a disappointed investor and his stockbroker. The plaintiff commenced trading with the defendant in 1981.

The action is presented to this Court under the guise of involving a violation of the Securities Exchange Act of 1934 ("1934 Act") 15 U.S.C. 78a, *et seq.* The Court is thus vested with jurisdiction by reason of Section 27 of that Act which confers upon the District Court of the United States exclusive jurisdiction of violations of that Act.

Plaintiff's complaint consists of five separate claims only the first of which is asserted to involve violations of the 1934 Act. The remaining four claims are based upon alleged violations of common law or state law and are tacked on to the one federal law violation claim under the principle of pendent jurisdiction.

The plaintiff is requesting a jury trial.

When the plaintiff commenced doing business with the defendant a written agreement was entered into between the parties concerning the conduct of that securities account. That agreement, the Customer's Agreement, con-

tains provisions which require arbitration of any dispute arising out of the conduct of the account. A copy of that agreement is attached as Exhibit "A" to this motion.

Plaintiff is obviously seeking to avoid the consequences of his agreement respecting arbitration by asserting those arbitrable claims under the guise as pendent claims tacked on to a clearly non-arbitrable claim based upon alleged violations of the Securities Exchange Act of 1934.

II. THE PENDENT CLAIMS SHOULD BE ORDERED SUBMITTED TO ARBITRATION

The maintenance of the pendent claims which are indeed subject to arbitration by reason of the existence of a written agreement between the parties would add considerably to the burdens both of this Court and of the parties in any eventual trial of this matter for reasons which were well stated by the court in *Kerby vs. Commodity Resources, Inc.*, 395 F.Supp. 786 (D. Colo. 1975), in a carefully reasoned opinion which concluded:

> "In sum, it is my view that litigation brought under the federal securities laws in the federal court should be limited to the claims for relief provided under those laws and that state claims should remain in the state courts in the absence of a showing of unfairness to the parties. 395 F.Supp. at 790-91.
>
> " . . . limitations on the federal securities law claim may well be the motivating reason for the type of joinder of claims made in this complaint and which has become typical in this kind of litigation. Such an apparent attempt to expand the scope of the remedy is a reason to reject these pendent claims in recognition of the limited role of the federal law and the federal courts. 395 F.Supp. at 790.

> "The likelihood of jury confusion is another criterion for evaluating pendent claims. To combine instruction on liability under common law fraud, breach of contract, Colorado Securities Act and the federal securities claims with the mixture of the measures of damages applicable under those different theories of recovery would so complicate the jury charge as to make it incomprehensible. That alone is a sufficient reason to deny the exercise of pendent jurisdiction." 395 F.Supp. at 790.

A perfect example of the concerns which were addressed in the above decision are present here. Plaintiff is seeking punitive damages under various of his pendent state law claims. Whatever their status under state law, punitive damages are clearly not recoverable in an action under Section 10(b) of the 1934 Act. *Waterman vs. First Fidelity Co.*, No. 72-1842 (C.D. Cal. 1972); *de Haas vs. Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir. 1970); *Globus vs. Law Research Services, Inc.*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970). For plaintiffs to be able, by using a pendent common law claim, to recover punitive damages would clearly defeat an important policy underlying the federal securities laws. That policy is expressed in Section 28 of the 1934 Act which provides that no one shall recover " . . . a total amount in excess of his actual damages. . . ."

Precedent has afforded this Court with a basis and the opportunity to sever the pendent claims and order that those claims be submitted to arbitration as enunciated in the written agreement between the parties. While numerous cases have considered this issue the decision most frequently cited even though it was announced in 1974 is that of the court in *Macchiavelli vs. Shearson*, 384 F.Supp. 24 (E.D.Cal. 1974). The court in that

action analyzed the policies favoring arbitration and determined that those policies compelled that the agreement which had been entered into between the parties involved in that litigation should be honored to the extent that it provided for arbitration of the dispute with the exception of the claims which were based upon alleged violations of the 1934 Act.

The Federal Arbitration Act (9 U.S.C. §1 *et seq.*) provides for arbitration of disputes when a written agreement exists between parties. Federal law has long favored arbitration and it is stated that: "Every doubt is to be resolved in favor of arbitration." *Galt vs. Libbey*, 376 F.2d 711, 714 (7th Cir. 1967).

Similarly California law and public policy clearly favor arbitration of disputes. Numerous cases have repeatedly confirmed this strong public policy. See *Lewsadder v. Mitchum, Jones & Templeton, Inc.*, 36 Cal. App. 3d 255 (1973), 111 Cal. Rptr. 405 and *Berman v. Dean Witter & Co., Inc.*, 44 Cal. App. 3d 999 (1975), 119 Cal. Rptr. 130, (1975).

Assuming that the Court does sever the pendent claims and order the same to arbitration the Court should stay that arbitration untii the federal securities issue raised by plaintiff's first claim has been tried and resolved. This is appropriate because the federal claim and the claims to be arbitrated are so intertwined as to render an arbitration of the non-federal claims practically an adjudication of the factual and legal issues underlying the federal claims as well.

Precedent for staying arbitration of these claims pending resolution of the federal claim is afforded by *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831 (7th Cir. 1977); *Stockwell v. Reynolds & Co.*, 252 F.Supp. 215; *Todd v. Oppenheimer & Co.*,

78 F.R.D. 415; *Rankl v. Elkins, Stroud, Suplee & Co.*, C. C. H. Fed. Sec. Law Rptr, ¶97,827 (N.D. Ill. 1980).

It is to be noted in this case that the plaintiff has alleged in essence the same facts as the underlying basis for both the federal and pendent claims. Thus, as mentioned above, the federal claim and the pendent claims are "intertwined". That fact has led several courts to decline severance of the pendent claims based upon announced principles of judicial economy and consistency of result. However, the better reasoned and most recent response to the intertwining theory was stated by the court in *Dickinsen v. Heinold Securities, Inc.*, 661 F.2d 638 (1981).

In that case the plaintiff customer had filed an action in federal court comprised of four counts, one of which was based upon an alleged violation of the Securities Exchange Act of 1934. The other three counts alleged various state law tort and contract claims. There, as here, there was a valid arbitration agreement between the parties. The lower court refused to sever the pendent claims and compel arbitration because the claims were intertwined. On appeal the United States Court of Appeals, Seventh Circuit reversed. In doing so the court dealt with the plaintiff's contentions in the following language, commencing at page 643:

> "Plaintiff's argument is derived from the 'doctrine of intertwining,' as primarily enunciated in a line of Fifth Circuit cases. [Citations] The 'doctrine of intertwining' is a judicially created exception to the statutory arbitration scheme. Under this doctrine, when arbitrable and non-arbitrable claims are sufficiently intertwined factually and legally, as appears to be the case here, the district court should deny arbitration as to the arbitrable claims and try all of the claims together in federal court.

> "Two reasons have been offered to justify this exception to the normally strong federal policy favoring the enforcement of arbitration agreements. First, the court should deny arbitration in order to preserve its exclusive jurisdiction over the non-arbitrable claim. [Citations] This argument has its greatest force in cases such as *Sibley, Miley* and the instant case where the non-arbitrable claim has been rendered non-arbitrable because of its relationship with specific federal legislation — here securities regulatory legislation. [Citation] We agree with the Fifth Circuit that a federal court has the sole right to decide the ultimate issues essential to a federal securities law claim. If arbitration of an 'intertwined' state claim preceded the federal proceeding, the federal forum might find itself bound through collateral estoppel.
>
> "But, this threat to the jurisdiction of the federal courts does not justify denying arbitration of otherwise arbitrable intertwined state law claims. [Citation] Where the non-arbitrable issues substantially permeate the entire case and make it difficult to separate out the arbitrable issues, the district court has discretion to stay arbitration pending a judicial resolution of the non-arbitrable claims. [Citation] By controlling the order of the two adjudications, a procedure certainly within the power of the district court, [Citation] the district court can preserve its full authority to decide the non-arbitrable federal issues without any collateral estoppel consequences from a prior arbitration. As the District of Columbia Circuit has pointed out, however, the permeation of intertwining doctrine provides 'no authority for the ruling that . . . arbitrable claims become subject to adjudication in court merely because they are re-

lated to non-arbitrable claims.' [Citation] Permeation merely permits controlling the order of the two adjudications. Id.

"The remaining justification asserted for the intertwining doctrine is efficiency. If arbitration is stayed pending the judicial resolution of intertwined securities claims, plaintiffs will be required to duplicate some portion of their efforts in order to pursue their arbitrable claims. But we do not feel that duplication of effort, insofar as we have perceived it, is sufficient to destroy the right to arbitration. If there is a bench trial, detailed findings of fact, Fed. R.Civ.P.42(a) should eliminate much of the duplication through the impact of collateral estoppel on the subsequent arbitration. [Citations] If plaintiffs seek a jury trial, a special verdict should accomplish the same purpose. In addition, plaintiffs who prevail in federal court may have no need to pursue their arbitrable claims because they will have already recovered their damages. [Citation] Or they may even settle those claims based upon the facts developed at their federal trials. All of these possibilities render the alleged inefficiency somewhat speculative.

"In any event, the efficiency argument has been rejected by this court in *C. Itoh & Co. v. Jordan Inter-National Co.*, 552 F.2d 1228 (7th Cir. 1977). In *Itoh* we stated that to permit a district court to deny a stay pending arbitration based on such discretionary considerations [of economy] would, in our opinion, frustrate the strong federal policy in favor of arbitration which is expressed in the Federal Arbitration Act ... [Citation]. *Itoh* involved a controversy containing both arbitrable and non-arbitrable issues. The district court had denied

arbitration of an otherwise arbitrable issue because it believed that sound judicial administration required the resolution of the entire lawsuit in a single forum. *Itoh* rejected this reasoning, however, and held that the district court *must* allow arbitration of an issue when (1) the issue is one which is referable to arbitration, and (2) the party applying for the stay is not in default in proceeding with such arbitration. [Citation]

"*Itoh* is also consistent with several provisions of the Arbitration Act. The Act itself provides for a bifurcated resolution of any controversy wherein a particular issue is subject to arbitration. See 9 U.S.C. §3 (1976). Further, the Act provides only a very limited authority for a federal court to review the provisions of an arbitration agreement. The Act sets out the two defenses quoted above and states peremptorily that the district court 'shall' enforce any agreement not subject to either of those defenses. 9 U.S.C. §3 (1976). In contrast to *Itoh*, the decisions of the Fifth Circuit, in particular the decision in *Sibley*, seem not to have given appropriate weight to the federal policies embodied in the Arbitration Act.

"Plaintiff attempts to distinguish *Itoh* from the instant case in that *Itoh* ostensibly did not involve as high a degree of duplication between the arbitrable and non-arbitrable issues. But this distinction does not do justice to one of the central policies of the Federal Arbitration Act underlying *Itoh*. The Act was designed 'to place arbitration agreements "upon the same footing as other contracts.' [Citations] The arbitration Act was specifically aimed at the historical problems of courts' refusing to honor contractual arbitration agreements. The Act was

intended to make arbitration agreements specifically enforceable, [Citations] upon the terms established by the parties. Accordingly, if the agreement provides for arbitration, the only issues open for the consideration of a federal court concern the 'making of the agreement to arbitrate' itself. [Citations]

"We must reject plaintiff's attempt to rest the resolution of each case upon the degree of intertwining to be discerned. In order for an arbitrable state law claim to be pendent to the securities claim for jurisdiction purposes, the evidentiary facts underlying those claims must be 'derived from a common nucleus of operative fact[s].' [Citation] As such, the intertwining doctrine would always threaten to become the exception that swallowed the rule, allowing the presence of a non-arbitrable claim to force a trial on the otherwise arbitrable claims. The Fifth Circuit had attempted to deal with this problem by distinguishing between mere 'factual intertwining' (in which arbitration would be preserved) and the circumstances where the 'same factual (and legal) conclusions must be drawn from the common evidentiary facts in order to resolve the federal and pendent state claims.' [Citation] This 'distinction' does not adequately address the problem, however, at least in the present securities law context in which skillful pleading will always produce enough intertwining between state law fraud and misrepresentation claims and the non-arbitrable federal securities claim to defeat arbitration."

III. CONCLUSION

It is urged that this Court should embrace the principles discussed in the *Dickinson* decision and not permit the plaintiff to try in this court four pendent claims which are clearly subject to arbitration. It is appropriate to again borrow from the decision in the *Dickinson* case wherein the court concluded, at page 646:

> "In summary, the Arbitration Act requires that we enforce the bargain of the parties as to dispute resolution and not substitute our own views of economy and efficiency. There is no room in the language of the Act, the decisions of the Supreme Court or the decisions of this court for an ad hoc approach, based on speculative considerations of efficiency toward enforcement of arbitration agreements. "[B]ifurcation of the federal and pendent state law claims is the only viable alternative under the present securities and arbitration acts.' [Citations] We hold, therefore, that the district court may not refuse to enforce an agreement to arbitrate because of the joinder of a non-arbitrable claim, even when bifurcated resolution may result in an assertedly inefficient or delayed resolution of the entire dispute."

DATED: January 7, 1983.

JONES, BELL, SIMPSON & ABBOTT

/s/ By EUGENE W. BELL
EUGENE W. BELL

Attorneys for Defendants

Memorandum of Points and Authorities in Opposition to Motion for Orders (1) Severing the Pendent Claims and Compelling Arbitration Thereof and (2) Staying Such Arbitration Pending Resolution of This Action. Date: February 14, 1983, Time: 10:30 A.M., Dept. 2, Hon. Howard B. Turrentine.

United States District Court, Southern District of California.

A. Lamar Byrd, Plaintiff vs. Dean Witter, Reynolds, Inc. a Delaware Corporation, Defendant. No. 82-1655-T(H).

Filed: February 7, 1983.

Plaintiff, A. LAMAR BYRD (hereinafter referred to as "BYRD"), respectfully submits the following MEMORANDUM OF POINTS AND AUTHORITIES in opposition to defendant's Motion for an Order severing the pendent claims and compelling arbitration thereof and staying such arbitration pending resolution of this action.

I

STATEMENT OF FACTS

This matter is before the Court on the motion of defendant DEAN WITTER, REYNOLDS, INC. (hereinafter referred to as "DEAN WITTER") to compel arbitration of the pendent claims pursuant to the U.S. Arbitration Act, 9 U.S.C. §4 (1970).

Defendant, DEAN WITTER, is a securities broker-dealer. Plaintiff BYRD, formerly a customer of plaintiff, alleges violations of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq*) as well as State and common law claims of fraud, breach of fiduciary duty and negligent mismanagement.

In early 1980 JOHN DOUGLAS GALE (hereinafter referred to as "GALE"), an agent and employee of defendant DEAN WITTER represented to BYRD that if

BYRD sold his dental practice and allowed GALE to invest the proceeds in securities through DEAN WITTER, that GALE could provide plaintiff with a regular monthly income. Starting in September, 1981, GALE began trading plaintiff's account in "uncovered" or "naked" options. Between September 1981 and March 1982, GALE traded in such securities without the prior consent of plaintiff and he treated plaintiff's account as a "discretionary" account. GALE never had written authority granting DEAN, WITTER discretion to purchase and sell securities on behalf of plaintiff without his prior approval. Between September 1981 and March 1982 GALE engaged in excessive purchase and sale of option contracts resulting in a "churning" of his account. Between September, 1981 and March, 1982 GALE represented to BYRD that he should pay no attention to the monthly statements received from DEAN, WITTER because such statements did not accurately reflect his account. GALE affirmatively represented to BYRD that trading in his account was generating a profit when in fact his account was reduced by more than $100,000.

Plaintiff contends that the Federal Securities law claim and the pendant claims are so intertwined as to render an arbitration of the non-federal claims an adjudication of the factual and legal issues underlying the Federal claims as well. This Court should decline to sever the pendent claims based upon announced principles of judicial economy and consistency of result.

II

THE FEDERAL POLICY PROTECTING INVESTORS HAS PRIORITY OVER THE POLICY FAVORING ARBITRATION

The right to arbitrate has been widely litigated in Federal and State Courts. The alleged violations of the

Securities Exchange Act of 1934 are clearly cognizable as a Federal cause of action and may not be submitted to arbitration pursuant to a pre-dispute arbitration agreement between the parties. *Wilko v. Swan*, 346 U.S. 427, 74, S. Ct. 182, 98 L. Ed 168 (1953). The *Wilko* Court carved out an exception to the policy favoring arbitration of claims by holding that an agreement to arbitrate future disputes was not enforceable as to issues arising under the Securities Act. This exception was adopted to protect the integrity of the marketplace. *Milani v. Conti Commodity Serv., Inc.* 462 F. Supp. 405 (N. D. Cal. 1976). In *Milani* the Court explained the decision in *Wilko v. Swan* as follows:

> "The *Wilko* Court made clear that the protection of investors by Federal courts controls over the policy favoring arbitration. Judicial direction, at the trial level, is essential to assure that legislation designed to protect investors is properly applied." *Id.*, at 407. 462 F. Supp 405, 407. (E.D. Cal. 1976)

The Securities and Exchange Commission has strongly reinforced the *Wilko* doctrine. In S.E.C. Securities Exchange Act Release Number 15984 (July 2, 1979) the commission warned broker-dealers who include arbitration clauses in agreements with their customers to inform such customers of their right to a judicial forum for the pursuit of claims arising under the Federal Securities law. The Commission emphasized the following views:

> "It is encumbent upon those who include arbitration clauses in agreements to provide adequate information about such rights in order to make the causes not misleading.
>
> "At the time of opening an account, customers are frequently not informed regarding the kinds of disputes for which the arbitration agreement would not be enforceable. .

> *"Moreover, the customer may be precluded from doing business with the broker-dealer if he or she refuses to sign the agreement or the broker-dealer is unwilling to accept any modification of its terms."* (Emphasis added).

III

THIS COURT SHOULD PRESERVE ITS EXCLUSIVE JURISDICTION OVER ALL CLAIMS

Defendant acknowledges that the Federal Securities claim cannot be arbitrated but attempts to sever the pendant claims and compel their arbitration following trial of the Federal Security claim.

Defendant admits that in this case the same facts serve as the basis for both the Federal and pendant claims:

> "It is to be noted in this case that the plaintiff has alleged in essence the same facts as the underlying basis for both the Federal and pendant claims. Thus as mentioned above, the Federal claim and the pendant claims are 'intertwined' ... The Federal claim and the claims to be arbitrated are so intertwined as to render an arbitration of the non-federal claims practically an adjudication of the facts from legal issues underline the Federal claims as well."

Defendant's Memorandum of Points and Authorities, page 5.

Where If the same facts serve as the underlying basis for both the Federal and the pendant claims, the entire controversy should be resolved in a single forum. In *Sawyer v. Raymond James & Associates*, 642 F. 2d 791, 793 (5th Cir. 1981), the Court restated the criteria for retaining jurisdiction over the entire controversy:

> "When it is impractical if not impossible to separate out non-arbitrable Federal Securities law claims from arbitrable contract claims, a Court should deny

arbitration in order to preserve its exclusive jurisdiction over the Federal Securities Act Claims. As we have applied this test, factual severability of the disputed claims is of central importance. If an arbitrator making a decision on the arbitrable claims would have been impelled to review the same facts needed to establish the plaintiff's securities law claim, a district court should not sever the arbitable claims."

In *Sawyer* the plaintiff alleged a single set of facts which constituted violations of the Fed. Securities laws, violation of the rules and regulations of the New York Stock Exchange and National Association of Securities Dealers and common law fraud, breach of fiduciary duty and negligence. The broker firm responded to these actions by filing a motion to compel arbitration of all or part of the claims. The Fifth Circuit Court of Appeals reversed a lower Court's holding that the State and common law claims were not subject to the *Wilko* rule and should be arbitrated. The Court used the test frequently cited in the Fifth Circuit and held that the gravaman of each of the causes of actions was that the defendant acted intentionally through misrepresentations to defraud the plaintiff by entering into a series of undisclosed, unjustified, high risk stock option transactions. The Court decided that it was this unitary course of conduct that was the common source of each of the alleged claims and therefore refused to sever the pendant claims:

> "Those claims sounding in Fed. Securities Law are the very core of the action; the other claims, while of independent significance, are inextricably tied to the factual allegations supporting the securities claims, and indeed could not stand absent those factual contentions." *Id* at 793.

Sibley v. Tandy Corp. 543 F. 2d 540 (5th Cir. 1976) *Cert. denied* 434 U.S. 824. (1977) involved a corporate merger agreement between Tandy Corporation and P. J. Parker, Inc., a holding company. Parker's shareholders were to be paid in Tandy stock, but when an audit by Tandy's accountants revealed that Parker's net worth was less than represented, Tandy refused to consummate the merger. Sibley, representing Parker's shareholders, brought suit against Tandy, claiming a breach of contract by Tandy, and also a violation of Rule 10b-5, State Securities Laws, and common law fraud. Parker was primarily seeking specific performance of the contract of merger, and claimed that the contract was valid and enforceable as Parker interpreted it. The securities law claim under Rule 10 b-5, the State securities law claim, and the common law fraud claim were, the Fifth Circuit stated, merely a "fall-back position," a claim that Parker's management was fraudulently induced to enter into the contract. Unlike the instant case, the very existence of the securities and fraud claims in *Sibley* were predicated upon the claim for specific performance being resolved against Parker.

The Fifth Circuit in *Sibley* severed the contract claim from the securities and fraud claims, reasoning that the dispute was essentialy a contract matter, and that the securities law claim was essentially "the rather small tail to a much larger dog." *Id.* at 543. The court, however did *not* sever the State securities law claim and the common law fraud claims from the Federal securities claim, even though it recognized that the State claims would *otherwise* be arbitrable. The Court stated:

> "While we hold that the logic of decisions such as *Shapiro* ... has no application to the relationship between the plaintiff's Federal securities and contract claims, we recognize that the reasoning in those

cases applies to the relationship between the plaintiff's Federal securities law claims and his State securities law claims and common law fraud claims. If an arbitrator were to resolve the plaintiff's Texas securities law and common law fraud complaints, he would be dealing with the *same facts which form the basis for plaintiff's claim of Federal securities law violations.* Therefore, we hold that plaintiff's claims under the Texas securities law, like his claims under the Federal securities laws, are not arbitrable." (Emphasis added.) *Id.*, n.4.

Because the essential dispute in the case was a contract matter, the Court stayed the State and Federal securities claims as well as the common law fraud claim, pending arbitration of the contract dispute. *Sibley v. Tandy Corp.*, however, clearly stands for the proposition that a *Court should not sever arbitrable, State claims from non-arbitrable Federal claims when the claims are intertwined and dependent upon the same facts for their resolution.*

In *Shapiro v. Jaslow*, 320 F. Supp. 598 (S.D.N.Y. 1970), one defendant, Jaslow, cross-claimed against a co-defendant, Newburger, Loeb and Co., alleging acts that would give rise to rights under both the common law and the Federal securities laws. Newberger, Loeb & Co., while acknowledging that Federal securities claims cannot be arbitrated, nevertheless argued that Jaslow's common law cross-claims should be subject to arbitration. The District Court denied arbitration of the State claims, and stated:

"Although we may have the power to stay arbitration with respect to the claims under the Securities Acts and leave the common law claims to the arbitration process, (citation), under the circumstances here such procedure is impractical, if not impossible,

since we cannot separate out the common law from the Federal law issues. Newburger, Loeb cannot render meaningless our exclusive jurisdiction over the Federal Securities Act claim by compelling arbitration of an ancillary pendent dispute. The arbitrator could hardly be expected to decide which issues are common law and which Federal securities issues: that is a question for the Court." *Id.*, at 600.

Another case cited by DEAN, WITTER in support of its motion to sever, but which mentions the rule applied by the *Shapiro* court, is *Macchiavelli v. Shearson, Hammill & Co.*, 384 F. Supp. 21 (E.D. Cal. 1974). In *Macchiavelli* the plaintiff brought claims under the Federal securities laws as well as claims for breach of contract, violation of Federal margin requirements, and violation of unspecified Federal rules dealing with credit transactions. The defendant moved to compel arbitration of all claims. The District Court noted that "The cases dealing with the power of the District Court to split the causes of action between the Federal Court and arbitration have recognized the District Court's broad discretion." *Id.*, at 31. The Court noted that in *Shapiro*, a severance was not possible, because the Federal issues were inseparable from the other issues. However the District Court determined that the circumstances before it were different in that the "claims of Securities Act violations in this case are clearly severable from the other claims, both factually and legally." *Id.*

Another securities fraud case in which the Court refused to sever arbitrable, pendant State law claims from non-arbitrable Federal securities claims is *Seymour v. Bache & Co., Inc.*, (1975-1976 Transfer binder) CCH Fed. Sec. L. Rep. 95,402 (S.D.N.Y. Jan. 14, 1976). In *Seymour* the plaintiff alleged that the defendant Bache

& Co. had violated Rule 10b-5, and also alleged several breaches of common law fiduciary duties. The gravamen of the action was "churning." The defendant sought an order of the Court staying the action and requiring arbitration of all issues pursuant to an arbitration agreement signed by the parties. The District Court held that the Federal securities claims were non-arbitrable, and then refused to sever the State law claims so that they could be arbitrated. The Court stated,

> "While some Courts have allowed the common law claims to proceed in the arbitral forum and left the securities claims to the Courts, this has not been done where, as here, the issues are complex and intertwined." *Shapiro v. Jaslow*, 320 F. Supp. 598 (S.D.N.Y. 1970)". *Id.*, at 99, 058.

As these cases indicate, a clear rule exists when non-arbitrable Federal securities law claims are joined with arbitrable state common law claims. In ruling on whether the arbitrable claims should be severed from the non-arbitrable, a judge has broad discretion (*Macchiavelli v. Shearson, supra,*) but the claims should not be severed when the issues are complex and intertwined. (*Seymour v. Bache & Co., Inc., supra*), when the Federal law issues are inseparable from the other issues (*Macchiavelli v. Shearson, supra*), when the Court cannot separate out the common law from the Federal issues (*Shapiro v. Jaslow, supra,*) or when an arbitrator making a decision on the common law claims would be compelled to review the same facts needed to establish the plaintiff's securities law claims. (*Sibley v. Tandy Corp., supra*).

Plaintiff's state law claims clearly come within this rule, as they are based on the same facts and involve the same issues as plaintiff's Federal securities law claims. Plaintiff's first claim against DEAN, WITTER, is contained in Count I and alleges violations of Sections 10(b)

and 15(c) and 20 of the Securities Exchange Act of 1934. It is essentially a claim based upon intentional misrepresentations by DEAN, WITTER, and in paragraphs 7 to 23 of the COMPLAINT, plaintffs set out the facts and issues upon which Count One is based. Paragrahs 7 to 23 allege that DEAN, WITTER induced plaintiff to transfer his assets to DEAN, WITTER; that DEAN, WITTER misrepresented or omitted to state accurately the manner in which plaintiff's assets would be handled and invested; that DEAN, WITTER's representations were statements of material fact upon which plaintiff relied; that DEAN, WITTER's representations and omissions were false and misleding, and that plaintiff was proximately damaged as a result thereof.

It can be readily seen that plaintiff's state law claims are based upon the same facts and involve the same issues as plaintiff's Federal securities law claims. Count Two alleging violation of California Securities Law merely incorporates by reference the allegations contained in paragraphs 7 to 23. Count Three alleging Common Law Fraud, similarly incorporates paragraphs 7 through 23. Counts Four and Five alleging Breach of Fiduciary Duty and Negligent Management also incorporate paragraphs 7 to 23. All state common law claims share with the Federal securities law claims the issues of misrepresentation, omission, materiality, reliance, scienter and causation.

The plaintiff is entitled to have his entire controversy settled in one forum, in front of one jury, and with one judge presiding. Bifurcation of the claims contradicts the Federal policy favoring pendent jurisdiction. The doctrine of pendent jurisdiction rests on the desire to have the parties resolve their entire controversy in one proceeding. Severance of factually and legally similar claims will almost inevitably result in duplication of time and

effort and may well prejudice the parties who are forced to litigate their controversy in a piecemeal fashion. Inherent danger also awaits a party compelled to try his or her case a second time after a portion of the case has been decided in another forum.

IV

CONCLUSION

Severance of the State issues would require that an arbirator deal with the same facts and resolve the same issues as the Federal court. Plaintiffs will be forced to prove the same facts twice; once in the trial of the Federal claims and again in the arbitration. Severance of the State claims would require a duplication of effort by all parties and serve no purpose but to delay resolution of this dispute and to impose further economic hardship on plaintiff.

For these reasons defendant's Motions to sever the pendent claims and compel their arbitration after the trial on the Federal securities claim should be denied.

Dated: February 4, 1983

Respectfully submitted,

SULLIVAN, DELAFIFLD,
McGRATH & McDONALD

/s/ By: ERIC V. BENHAM
ERIC V. BENHAM

Defendant's Reply to Plaintiff's Opposition to Motion to Arbitrate. Date: February 15, 1983, Time: 10:30 a.m., Courtroom 6, Hon. Howard B. Turrentine.

United States District Court Southern District of California.

A. Lamar Byrd, Plaintiff, vs. Dean Witter Reynolds Inc., a Delaware corporation, Defendant. No. CV 82-1655 - T.

Filed: February 8, 1983.

Defendant and moving party herein submits its reply to plaintiff's opposition to the motion for an order severing the pendent claims and compelling arbitration thereof and staying arbitration until judicial resolution of the sole claim based upon an alleged violation of the federal securities law.

I. STATEMENT OF CASE

Plaintiff's complaint herein contains one claim, the first, which alleges violations of the Securities Exchange Act of 1934 ("Securities Exchange Act"). Such claim is clearly not subject to any pre-existing agreement to arbitrate. *Wilco v. Swan*, 346 U.S. 427. Appended to this first claim, however, are four separate claims based upon alleged violations of common law or state law. These pendent claims are clearly subject to the valid and subsisting arbitration agreement which exists between the parties to this litigation. There is no question but that if the plaintiff had commenced an action in state court based upon those four claims that such action would be stayed and the dispute would be ordered submitted to arbitration. *Berman vs. Dean Witter & Co.*, 44 Cal. App. 3d 999 (1975); *Lewsadder v. Mitchum, Jones & Templeton, Inc.*, 36 Cal. App. 3d 255 (1973). Plaintiff seeks to avoid arbitration of these four claims by tacking on one federal law claim and bringing this action in this Court.

II. ARGUMENT

The principal thrust of plaintiff's objections is a recitation of the plaintiff's version of the financial background which underlies his claims. Obviously, for the purposes of this motion, that recitation must be accepted as true. However compelling the plaintiff's story may appear it should not cause this Court to forget legal niceties and sweep aside judicial and statutory precedent so that plaintiff can pursue his quest for punitive damages. Can there be any doubt but that the plaintiff's primary motivation for tacking on pendent claims is to pursue punitive damages. Such damages are clearly and simply not cognizable in an action to recover under Section 10b of the Securities Exchange Act by reason of Section 28 thereof which provides that no one shall recover "... a total amount in excess of his actual damages ...".

Plaintiff argues that this Court, absent any other considerations, can entertain the pendent claims. The defendant does not dispute that point. In this case, however, there are other considerations, namely that the complainant has contractually obligated himself with the defendant to arbitrate the pendent claim disputes. The plaintiff does not dispute this point.

The plaintiff, in addition to raising his emotional appeal, raises certain predictable legal arguments in opposition to this motion. As noted below, those arguments have all been squarely met and soundly overruled. In the most recent and leading case in the field, *Dickinson v. Heinold Securities, Inc.* 661 F.2d 638 (1981). The plaintiff argues that the intertwining of the factual and legal basis underlying both the federal claim and the pendent claims mandate resolution of all claims in this Court. The Dickinson court dealt with this theory at length. That court concluded by stating:

> "We must reject plaintiff's attempt to rest the resolution of each case upon the degree of intertwining to be discerned. In order for an arbitrable state law claim to be pendent to the securities claim for jurisdiction purposes, the evidentiary facts underlying those claims must be 'derived from a common nucleus of operative fact[s].' [Citation] As such, the intertwining doctrine would always threaten to become the exception that swallowed the rule, allowing the presence of a non-arbitrable claim to force a trial on the otherwise arbitrable claims. The Fifth Circuit had attempted to deal with this problem by distinguishing between mere 'factual intertwining' (in which arbitration would be preserved) and the circumstance where the 'same factual (and legal) conclusions must be drawn from the common evidentiary facts in order to resolve the federal and pendent state claims.' [Citation] This 'distinction' does not adequately address the problem, however, at least in the present securities law context in which skillful pleading will always produce enough intertwining between state law fraud and misrepresentation claims and the non-arbitrable federal securities claim to defeat arbitration." (page 645)

The plaintiffs next argue that considerations of judicial economy, convenience and fairness militate in favor of retaining jurisdiction over the pendent claims. Again the *Dickinson* court dealt with this argument most effectively when it stated:

> "The remaining justification asserted for the intertwining doctrine is efficiency. If arbitration is stayed pending the judicial resolution of intertwined securities claims, plaintiffs will be required to duplicate some portion of their efforts in order to pursue their arbitrable claims. But we do not feel that

duplication of effort, insofar as we have perceived it, is sufficient to destroy the right to arbitration. If there is a bench trial, detailed findings of fact, Fed. R. Civ. P. 42 (a) should eliminate much of the duplication through the impact of collateral estoppel on the subsequent arbitration. [Citations] If plaintiffs seek a jury trial, a special verdict should accomplish the same purpose. In addition, plaintiffs who prevail in federal court may have no need to pursue their arbitrable claims because they will have already recovered their damages. [Citation] Or they may even settle those claims based upon the facts developed at their federal trials. All of these possibilities render the alleged inefficiency somewhat speculative." (page 644)

In disposing of the economy, convenience and fairness arguments the *Dickinson* court ruled:

> " ... to permit a district court to deny a stay pending arbitration based on such discretionary considerations [of economy] would, in our opinion, frustrate the strong federal policy in favor of arbitration which is expressed in the federal Arbitration Act ..." (page 644)

Most recently this same issue has been considered by the United States District Court, Northern District of Illinois in *Hughes, et al., v. Paine, Webber, Jackson & Curtis, Inc., et al.* In its September 15, 1982 opinion, the court sided with the *Dickinson* case and stated:

> "Where arbitrable and non-arbitrable claims are present the Seventh Circuit has adopted the 'permeation doctrine' to determine the order of proceedings: 'Where non-arbitrable issues substantially permeate the entire case and make it difficult to separate out the arbitrable issues the district court has the discretion to *stay* arbitration pending a judicial resolution of the non-arbitrable claims.' [Citations] Lower courts have stayed arbitration where the non-arbitrable claims are the gravamen of the complaint. [Citations] The courts have reasoned that if arbitration is allowed to proceed first in a case where nonarbitrable issues predominate there would be a risk of usurping the power of federal courts to decide securities law questions."

III. CONCLUSION

The plaintiff, in opposing this motion, is relying heavily upon cases which were all decided prior to the *Dickinson* case. A distinguishing feature of those earlier cases is that the parties seeking arbitration of the pendent claims sought to have the arbitration precede the trial of the federal securities issues, thus, in effect, depriving the court of its sole right to determine the issues presented in the federal claim.

The *Dickinson* decision analyzes those earlier cases and reaches a more logical conclusion when it points out that the proper order of procedure is to stay arbitration of the pendent claims until judicial resolution of the federal securities claim.

The plaintiff in his opposition decries the supposed duplication which would result from arbitration of the pendent claims. As the court noted in the *Dickinson* case, the possibility of duplication of effort is not in itself sufficient to destroy the contractual right to arbitration. Detailed findings of fact in a bench trial or special verdicts in a jury trial should eliminate much of the duplication through the impact of collateral estoppel on the subsequent arbitration.

The speculative possibilities raised by the plaintiff do not outweigh the strong federal policy in favor of arbitration.

DATED: February 7, 1983.

Respectfully submitted,

JONES, BELL, SIMPSON & ABBOTT
/s/ By EUGENE W. BELL
EUGENE W. BELL

Attorneys for Defendant
DEAN WITTER REYNOLDS INC.

Notice of Appeal.

United States District Court, Southern District of California.

A. Lamar Byrd, Plaintiff, vs. Dean Witter Reynolds Inc., a Delaware corporation, Defendant. No. CV 82-1655-T(H).

Filed: March 15, 1983.

Notice is hereby given that DEAN WITTER REYNOLDS INC., defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit.

This appeal is made from the Order of this Court denying defendant's motion for an order severing pendent claims and compelling arbitration thereof and staying such arbitration pending resolution of the action, which Order was made at the hearing on defendant's motion on the 15th day of February, 1983.

Dated: March 8, 1983

JONES, BELL, SIMPSON & ABBOTT
/s/ By KEVIN K. FITZGERALD
KEVIN K. FITZGERALD

Attorneys for Defendant
DEAN WITTER REYNOLDS INC.

PETITIONER'S

BRIEF

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No. 83-1708

IN THE

Supreme Court of the United States

October Term, 1983

DEAN WITTER REYNOLDS INC.,

Petitioner,

vs.

A. LAMAR BYRD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

EUGENE W. BELL,
Counsel of Record; and
KEVIN K. FITZGERALD,
JONES, BELL, SIMPSON & ABBOTT,
800 Wilshire Boulevard,
Fifth Floor,
Los Angeles, Calif. 90017,
(213) 485-1555,
Attorneys for Petitioner.

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

BEST AVAILABLE COPY

Question Presented.

Whether the district court erred in denying petitioner's motion for an order compelling arbitration of respondent's pendent state law claims and staying that arbitration pending judicial resolution of respondent's claim under the federal securities laws.

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No. 83-1708

IN THE

Supreme Court of the United States

October Term, 1983

DEAN WITTER REYNOLDS INC.,

Petitioner,

vs.

A. LAMAR BYRD,

Respondent.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the court of appeals is reported at 726 F.2d 552 (9th Cir. 1984). The order of the district court is not reported.

JURISDICTION.

The judgment of the court of appeals was entered on February 22, 1984. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1) (West 1966) providing for review by writ of certiorari. Petition for Writ of Certiorari was docketed on April 19, 1984, within the ninety day period after entry of judgment provided for in 28 U.S.C.A. §2101(c) (West 1982).

STATUTES INVOLVED.

1. Section 2 of the United States Arbitration Act, 9 U.S.C.A. §2 (West 1970) provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving

commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

2. Section 3 of the Act, 9 U.S.C.A. §3 (West 1970) provides:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

STATEMENT OF THE CASE.

Plaintiff and respondent A. Lamar Byrd (hereinafter "Byrd") filed his complaint (J.A. 2) against defendant and petitioner Dean Witter Reynolds Inc.[1] (hereinafter "Dean Witter") on December 1, 1982. The complaint alleges five separate claims for relief. Only the first claim is alleged to arise under federal law. It alleges a violation of the Securities Exchange Act of 1934[2] (the "Exchange Act").

[1]Petitioner Dean Witter Reynolds Inc. is a wholly owned subsidiary of Dean Witter Financial Services Inc., which is, in turn, a wholly owned subsidiary of Sears, Roebuck & Co.

[2]15 U.S.C.A. §78a, *et seq.* (West 1981).

Byrd's remaining four claims are based on alleged violations of state law and are present in the federal forum due to the diversity of citizenship of the parties, and because of the principle of pendent jurisdiction. Byrd has denominated these pendent state law claims as: (1) "California Corporations Code §§25401, 25501 and 25504", (2) "Fraud and Deceit", (3) "Breach of Fiduciary Duty", and (4) "Negligent Management".

The allegations forming the basis for subject matter jurisdiction of Byrd's claims in the federal district court are made in the third paragraph of respondent's complaint (J.A. 2). Byrd alleges:

"This Court has jurisdiction of this action under the provisions of §27 of the Securities and [sic] Exchange Act of 1934, 15 U.S.C. §78(a) [sic], 28 U.S.C. §1331(a) [sic] and 1332(a), and by virtue of its pendant [sic] jurisdiction over non-Federal claims arising from the same facts as the Federal causes of action [sic]. This controversy exceeds the sum of $10,000 exclusive of interest and costs."

Byrd alleges in the first paragraph of his complaint that the action "arises under §10(b) and 15c and 20 of the Securities Exchange Act of 1934 as amended, 15 U.S.C. §§78j(b), 17 [sic] o(c) and 78t, California Corporations Code §§25401, 25501 and 25504, and certain common law theories."

The allegations supporting Byrd's claims for relief include, *inter alia*, that Byrd opened an account with Dean Witter in reliance upon various representations by Dean Witter's agent; that Dean Witter's agent traded in Byrd's account without the prior consent of Byrd; that the number of transactions executed in Byrd's account was excessive; that misrepresentations were made by Dean Witter's agent as to the status of Byrd's account;

and that Dean Witter's agent acted with the knowledge, participation, and ratification of Dean Witter.

In August of 1981, when Byrd commenced doing business with Dean Witter, a written contract was entered into between the parties concerning their rights and obligations with respect to the conduct of Byrd's securities account. That contract, the Customer's Agreement (J.A. 14), contains a provision requiring arbitration of any controversy arising out of the conduct of the account (J.A. 18).

In light of its contract with Byrd to arbitrate any controversy arising out of Byrd's account, but recognizing that pre-dispute agreements to arbitrate claims arising under Section 10(b) of the Exchange Act are presently held to be unenforceable,[3] Dean Witter filed a

[3]This Court held in *Wilko v. Swan*, 346 U.S. 427 (1953), that arbitration of claims asserted under Section 12(2) of the Securities Act of 1933, 15 U.S.C.A. § 77*l*(2) (West 1981) (the "Securities Act"), could not be compelled. The decision was based on language in Section 14 of the Securities Act, 15 U.S.C.A. § 77n (West 1981) to the effect that provisions in agreements waiving compliance with provisions of the Securities Act are void. Due to the existence of a similar provision in the Exchange Act (Section 29, 15 U.S.C.A. §78cc (West 1981)), some district courts and courts of appeal have held that agreements to arbitrate claims arising under Section 10(b) of the Exchange Act are unenforceable. See, e.g., *DeLancie v. Birr, Wilson & Co.*, 648 F.2d 1255, 1258-59 (9th Cir. 1981); *Massbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1039 (6th Cir. 1979); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823, 827-29 (10th Cir. 1978); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831, 833-35 (7th Cir. 1977); *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977); *Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532, 536 (3d Cir.), *cert. denied*, 429 U.S. 1010 (1976); *Greater Continental Corp. v. Schechter*, 422 F.2d 1100, 1103 (2d Cir. 1970); *Macchiavelli v. Shearson, Hammill & Co.*, 384 F.Supp. 21, 27-28 (E.D.Cal. 1974); *Reader v. Hirsch & Co.*, 197 F.Supp. 111, 116-17 (S.D.N.Y. 1961).

This Court has not directly addressed the issue of whether the judicially created exception to arbitration announced in *Wilko*

motion for an order severing and compelling arbitration of Byrd's pendent state law claims (J.A. 12). Further, in recognition of the exclusive jurisdiction of the federal courts over Exchange Act claims, Dean Witter's motion to compel arbitration also sought a stay of arbitration of

applies to Exchange Act claims. In *Scherk v. Alberto Culver Co.*, 417 U.S. 506 (1974), however, this Court noted that the Exchange Act neither establishes the "special right" found significant in *Wilko*, nor does it contain certain of the provisions of the Securities Act that the Court in *Wilko* held could not be waived by Wilko's agreement to arbitrate. Even accepting "the premise" that the operative portions of the Securities Act relied on in *Wilko* are contained in the Exchange Act, the Court in *Scherk* found it unnecessary to decide the issue since there were "crucial differences" between the agreements in *Scherk* and *Wilko*. *Id.* at 515.

Although not expressly raised in the district court in the instant case due to the holdings of the district courts and courts of appeal noted *supra*, the question of the enforceability of agreements to arbitrate claims arising under Section 10(b) of the Exchange Act appears to be of central importance to the resolution of the instant question, or at least a "subsidiary question fairly included therein". Sup.Ct.R. 21.1(a). Were this Court to find that the *Wilko* exception to the enforceability of arbitration agreements does not apply to Exchange Act claims, the question sought to be reviewed in the instant case would be obviated since all of Byrd's claims would be arbitrable.

Such a result would not appear to conflict with this Court's decision in *Wilko*. The claim asserted in *Wilko* arose under Section 12(2) of the Securities Act, a section expressly providing a special right of action to an aggrieved purchaser of a security to recover for a misrepresentation, whereas the private right of action under Section 10(b) is of judicial construction, implied rather than express. Holding agreements to arbitrate such claims as stipulations waiving compliance with provisions of the Exchange Act under Section 29(a), 15 U.S.C.A. §78cc(a) (West 1981), requires elevating a judicially implied right of action to that of a special right of action created by Congress, and equating Section 22, the choice of forum provision of the Securities Act, 15 U.S.C.A. §77v (West 1981), with Section 27, the restricted forum provision of the Exchange Act, 15 U.S.C.A. §78aa (West 1981). See this Court's discussion in 417 U.S. at 513-15.

Further, one of the primary bases of the decision in *Wilko* was that an arbitration agreement was a stipulation waiving the wider choice of courts and venue given to a security buyer under Section 22 of the Securities Act. 346 U.S. at 434-35. No such choice of

the pendent state claims pending resolution of Byrd's Exchange Act claim in the federal district court.

By its order entered March 14, 1983 (Appendix B to Petition for Certiorari), the United States District Court denied Dean Witter's motion in its entirety. The United States Court of Appeals for the Ninth Circuit affirmed (Appendix A to the Petition for Certiorari), holding that "when there are arbitrable and nonarbitrable claims arising out of the same transaction, the district court should have discretion to evaluate the degree to which the claims are intertwined. If the district court determines that they are so intertwined that the purposes of the Arbitration Act and the protective intent of the federal securities laws would be frustrated by separating the claims, then it should refuse to separate them".

SUMMARY OF ARGUMENT.

I. State law claims pendent to federal securities claims in the federal courts should be arbitrated in accordance with the agreement of the parties and the mandate of the United States Arbitration Act, 9 U.S.C.A. §1 *et seq.*, (West 1970). Section 2 of the Arbitration Act declares that agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable ...." 9 U.S.C.A. §2 (West 1970). Section 3 of the Act requires that if a suit is brought on an issue referable to arbitration the court "shall" stay the trial until arbitration has been had. 9 U.S.C.A. §3 (West 1970).

This Court held in *Wilko v. Swan*, 346 U.S. 427 (1953), that arbitration of claims asserted under Section 12(2) of the Securities Act of 1933, 15 U.S.C.A. §77*l*(2) (West 1981), could not be compelled. Subsequent decisions by

courts exists under the Exchange Act, since Section 27 grants "exclusive" jurisdiction of claims arising under the Exchange Act to the federal courts.

the federal circuit courts of appeal and district courts have held claims arising under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.A. §78a, *et seq.* (West 1981), similarly unenforceable. As a result, the federal courts frequently face suits containing both arbitrable and nonarbitrable claims.

The *Wilko* exception to enforcement of arbitration agreements for federal securities claims does not create an ambiguity in the Arbitration Act with regard to arbitration of pendent state law claims. The plain meaning of the statute requires enforcement of arbitration agreements with respect to claims which are arbitrable and subject to a valid arbitration agreement. Since the statutory language is clear, there is no need to examine legislative history. *Packard Motor Car Co. v. NLRB*, 278 U.S. 269, 278 (1947).

Even when the legislative history of the Arbitration Act is examined, it affirms that arbitration of the pendent state law claims in the instant case should be compelled. The legislative history reflects Congressional emphasis on the sanctity of contracts and enforcement of contractual rights. "[T]he effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him." H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). There is "practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly entered into." S.Rep. No. 536, 68th Cong., 1st Sess., 3 (1924). The denial of the contractual right to arbitration of pendent state law claims based merely on the presence of a nonarbitrable federal securities claim is contrary to the language and legislative history of the Arbitration Act.

II. The courts of appeal have split on the question of whether the district courts should compel arbitration

of arbitrable pendent state law claims when those claims are joined with a nonarbitrable claim brought under the federal securities laws. The Fifth, Ninth, and Eleventh Circuits have adopted the "doctrine of intertwining" to justify the denial of arbitration of pendent state law claims and their retention for judicial resolution. *Byrd v. Dean Witter Reynolds, Inc.*, 726 F.2d 552 (9th Cir. 1984); *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023 (11th Cir. 1982); *Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318 (5th Cir. 1981). The doctrine of intertwining was originally "formulated as an exception to the requirement that arbitrable claims be referred to arbitration in order to preserve the exclusive jurisdiction of the federal courts in areas where such exclusivity exists", 637 F.2d at 335. As enunciated, the doctrine holds that "when it is impracticable if not impossible to separate out non-arbitrable federal securities law claims from arbitrable contract claims, a court should deny arbitration in order to preserve its exclusive jurisdiction over the federal securities act claims." *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977).

The intertwining doctrine subsequently has been justified on the ground that judicial retention of claims is both more efficient and more protective of the intent of the federal securities laws than the bifurcated resolution required for enforcement of arbitration of state law claims in mixed claims cases. *Byrd v. Dean Witter Reynolds, Inc.*, 726 F.2d at 554; *Miley v. Oppenheimer & Co., Inc.*, 637 F.2d at 336-37; *Cunningham v. Dean Witter Reynolds, Inc.*, 550 F.Supp. 578, 585 (E.D.Cal. 1982).

The other response of the courts of appeals to cases containing mixed arbitrable/nonarbitrable claims is the bifurcated resolution adopted by the Sixth, Seventh, and Eighth Circuits. *Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59 (8th Cir. 1984); *Liskey v. Oppenheimer & Co., Inc.*, 717 F.2d 314 (6th Cir. 1983); *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638 (7th Cir. 1981). In actions containing both arbitrable state law claims and a nonarbitrable federal securities claim, these Circuits advocate severance and arbitration of arbitrable claims, and a stay of arbitration pending judicial resolution of the federal securities claim.

The solution of bifurcated resolution in mixed arbitrable/nonarbitrable claims cases is preferable to judicial retention and resolution of all claims because it preserves arbitration as to arbitrable claims. By controlling the sequence of the proceedings so that adjudication precedes arbitration, the exclusive jurisdiction of the federal courts over claims under the Securities Exchange Act of 1934, 15 U.S.C.A. §78a *et seq.* (West 1981), is not threatened. The district court preserves its authority to decide nonarbitrable federal issues without collateral estoppel consequences from a prior arbitration. *Dickinson v. Heinold Securities, Inc.*, 661 F.2d at 643-44.

Bifurcated resolution is said to be inefficient and thus counter to the purposes of the Arbitration Act. This emphasis on the alleged inefficiency of bifurcation, however, is erroneous for at least three reasons. First, it is clear from the legislative history that the enforcement of contractual rights was of equal or greater importance than efficiency in motivating Congress to enact the Arbitration Act. Second, inquiry into policy, as occurred in *Wilko v. Swan*, 346 U.S. 427 (1953), with regard to arbitration of Securities Act claims, is not necessary with respect to arbitration of pendent state law claims. In *Wilko*, policy analysis — efficiency of arbitration versus choice of forum for dispute resolution — was conducted in the context of a statutory conflict. Here the conflict is between a federal statute, the Arbitration Act, and a judicially

created doctrine, intertwining. The judicially created doctrine therefore must fail and the statute prevail. No inquiry into policy is necessary. Third, bifurcated resolution is arguably more efficient than judicial retention and resolution of pendent state law claims. Collateral estoppel impact from the trial of the federal securities claim on the arbitration will eliminate duplication, *Dickinson v. Heinold Securities, Inc.*, 661 F.2d at 644; simplification of issues as to burden of proof and level of proof will reduce the number of trial days and time spent in preparation for the federal trial, *Liskey v. Oppenheimer & Co., Inc.*, 717 F.2d at 320; and expedited resolution of the federal trial will reduce the attorneys' fees incurred by the litigants.

III. District court discretion to retain arbitrable pendent state law claims for judicial resolution will undermine the Arbitration Act. Any claims which have the "common nucleus of operative fact", *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), required for the exercise of pendent jurisdiction are intertwined sufficiently to avoid arbitration under the intertwining doctrine. Discretion to retain these claims for judicial resolution will almost invariably result in retention of these claims and a denial of arbitration. The intertwining doctrine thus will become the "exception that swallowed the rule" by allowing the presence of a nonarbitrable claim to force a trial on the otherwise arbitrable claims. *Dickinson v. Heinold Securities, Inc.*, 661 F.2d at 645-46.

Skillful pleading of specious federal securities claims for the sole purpose of avoiding arbitration will result from allowing district courts discretion to retain arbitrable state law claims for judicial resolution. In addition, since arbitrable state law claims are regularly ordered to arbitration in state courts but may be retained for judicial resolution if brought in federal court, allowing district

court judges discretion to deny arbitration of state law claims under the intertwining doctrine will encourage forum shopping.

District court discretion to retain arbitrable state law claims for judicial resolution also conflicts with recent decisions of this Court. In *Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.*, 103 S.Ct. 927, 939, 74 L.Ed 2d 765, 782 (1983) this Court stated that "the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. [footnote omitted.]" (Emphasis in original.) In *Southland Corp. v. Keating*, 104 S.Ct. 852, 856, 79 L.Ed.2d 1, 10 (1984) this Court affirmed that "[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts." The analysis of each of these cases requires arbitration of arbitrable state law claims even if those claims are appended to a federal securities claim.

ARGUMENT.

The United States District Court for the Southern District of California committed an error of law by denying Dean Witter's motion for an order severing and compelling arbitration of Byrd's pendent state law claims, and staying that arbitration pending judicial resolution of Byrd's Exchange Act claim. That error was affirmed on appeal by the United States Court of Appeals for the Ninth Circuit.

I.

THE PLAIN MEANING AND THE LEGISLATIVE HISTORY OF THE UNITED STATES ARBITRATION ACT REQUIRE ARBITRATION OF BYRD'S PENDENT STATE LAW CLAIMS.

A. The Language of the United States Arbitration Act Is Unambiguous and Requires Arbitration of Byrd's Pendent State Law Claims.

Congress passed the United States Arbitration Act, 9 U.S.C.A. §1, *et seq.* (West 1970) on February 12, 1925. Section 2 of the United States Arbitration Act (the "Arbitration Act"), 9 U.S.C.A. §2 (West 1970), concerns the enforceability of agreements to arbitrate and declares that such agreements "shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract". Section 3 of the Arbitration Act, 9 U.S.C.A. §3 (West 1970), requires that a federal court stay an action brought in its court pending arbitration at the request of a party if the issue involved in the suit is referable to arbitration pursuant to a written agreement between the parties:

> "If any suit or proceeding be brought . . . upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending . . . *shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ." (Emphasis added.)

Because this Court perceived a conflict between the provisions of the Arbitration Act and the provisions of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C.A. §77a *et seq.* (West 1981), it held in *Wilko v. Swan*, 346 U.S. 427 (1953), that arbitration of claims asserted under Section 12(2) of the Securities Act, 15 U.S.C.A. §77*l*(2) (West 1981), could not be compelled. Subsequent decisions by various district courts and courts of appeal have held that agreements to arbitrate claims arising under Section 10(b) of the Exchange Act are similarly unenforceable.[4] Since plaintiffs frequently append state law claims to federal securities claims, under *Wilko* and its progeny, district courts frequently face suits containing both arbitrable and nonarbitrable claims.

The question presented for review in this Court thus concerns whether the federal district courts should compel arbitration of clearly arbitrable pendent state law claims, when those claims are joined with a nonarbitrable claim brought under the federal securities laws.

While the courts have created an exception to arbitration for claims under the federal securities laws, such an exception does not create an ambiguity in the Arbitration Act with respect to arbitrable claims. The "plain meaning" of the Arbitration Act requires the enforcement of arbitration agreements with respect to claims which are arbitrable and subject to a valid arbitration agreement. Since the statutory language is clear, there is no need to examine legislative history. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947). A court may depart from the official text of a statute and seek extrinsic aids

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[4]See note 3 *supra* and cases cited therein.

to its meaning (1) if the language is not clear, *United States v. Missouri Pacific R.R. Co.*, 278 U.S. 269, 278 (1929), or (2) if apparent clarity of language leads to an absurd or unreasonable result when applied, *United States v. American Trucking Associations*, 310 U.S. 534, 543-44 (1940); *Church of Scientology v. United States Department of Justice*, 612 F.2d 417, 421 (9th Cir. 1979), or (3) if literal adherence to the statute would "bring about an end completely at variance with the statute. . . ." *United Steel Workers v. Weber*, 443 U.S. 193, 202 (1979). None of these exceptions is applicable here.

Although the language of Section 3 of the Arbitration Act does not expressly reference nonarbitrable claims, it does provide as to arbitrable claims that a court "shall stay the trial of the action until such arbitration has been had." As the Seventh Circuit noted in *Kroog v. Mait*, 712 F.2d 1148, 1152 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1001, 79 L.Ed.2d 233 (1984), in holding that the Arbitration Act preempted a state statute forbidding arbitration of claims under the statute:

> "The matter might well stand differently if the Federal Arbitration Act declared only a general non-binding policy in favor of arbitration, through the use of such qualifying words as 'where feasible.' But the language of the Act is not precatory."

The plain meaning of the language of Section 3 is that trial of arbitrable claims must be stayed pending their arbitration. If the arbitrable claims are accompanied by a nonarbitrable federal securities claim, there is nothing in the language of the Arbitration Act to suggest that that fact should prevent arbitration of the arbitrable claims.

B. The Legislative History of the Arbitration Act Reflects Congressional Emphasis on Enforcement of Contractural Rights.

Even assuming, *arguendo*, that the language of the Arbitration Act is ambiguous, an analysis of the legislative history of the Arbitration Act reflects Congressional emphasis on enforcement of contractual rights and requires enforcement of the arbitration agreement as to Byrd's pendent state law claims. The need for the Arbitration Act was explained in the report to the House of Representatives as arising from an anachronism embedded in English common law and adopted by American courts — English courts, jealous of their jurisdiction, refused to enforce agreements to arbitrate on the ground that the courts were ousted from their jurisdiction.[5] H.R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924). The purpose and effect of the Act were also discussed in the House report which emphasized the freedom to contract and the concomitant obligation to honor contractual commitments.

> "Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs." *Id.* at [illegible].

A similar evaluation was made by Representative Graham in Congressional debate on the House bill:

> "It does not affect any contract that has not the agreement in it to arbitrate, and only gives the

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[5]This jurisdictional jealousy which prompted Congress to enact the Arbitration Act in 1925 appears to have gained renewed vitality through the decision of the Ninth Circuit in the instant case. Under the decision, district courts have discretion to refuse to enforce agreements to arbitrate clearly arbitrable claims solely because of the presence of a nonarbitrable federal securities claim. See App. A to the Pet. for Writ of Cert. at 4.

> opportunity after personal service of asking the parties to come in and carry through, in good faith, what they have agreed to do. . . ." 65 Cong. Rec. H1931 (daily ed., February 5, 1924) (statement of Rep. Graham).

Both the House and Senate Reports mentioned the delay and expense of litigation which can be avoided through arbitration. The Senate Report quoted a New York Times article as to these benefits as experienced by those participating in voluntary arbitration under the auspices of the Arbitration Society of America. S.Rep. No. 536, 68th Cong., 1st Sess., 3 (1924). The Senate report concluded its discussion of the benefits of arbitration, however, with an emphasis on the sanctity of contractual commitments.

> "The record made under the supervision of [the Arbitration Society of America] shows not only the great value of voluntary arbitrations but the practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly entered into." *Id.*

The Congressional emphasis on sanctity of contractual commitments evident in the legislative history of the Arbitration Act reinforces the need for arbitration of state law calims in the instant case. The mere presence of a nonarbitrable Exchange Act claim in the federal forum is being used by some courts to justify denial of the contractural right to arbitration of clearly arbitrable claims. Such denial of the right to arbitration possessed by each party to an arbitration agreement is contrary to the mandate of Congress as expressed in both the language of the Arbitration Act and its legislative history.

II.

THE MANDATE OF THE ARBITRATION ACT MUST PREVAIL OVER THE DOCTRINE OF INTERTWINING.

A. A Federal Statute Supersedes a Judicial Creation.

The courts of appeal have split on the question of whether the federal district courts should compel arbitration of clearly arbitrable claims when those claims are joined with a nonarbitrable claim brought under the federal securities laws. The Fifth, Ninth, and Eleventh Circuits when faced with petitions to compel arbitration under such circumstances have denied arbitration of the arbitrable claims and retained all of the claims for judicial resolution. *Byrd v. Dean Witter Reynolds, Inc.*, 726 F.2d 552 (9th Cir. 1984); *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023 (11th Cir. 1982); *Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318 (5th Cir. 1981). This denial of arbitration has been justified on the ground that where the facts supporting all of the claims are "intertwined", arbitration of state claims would be inefficient, might bind the federal court through collateral estoppel, and might frustrate the protective intent of the federal securities laws.

The other position of courts on the question presented for review is that espoused by the Sixth, Seventh, and Eighth Circuits. Those Circuits have adopted bifurcated resolution of actions containing both arbitrable claims and a nonarbitrable federal securities claim by ordering severance and arbitration of arbitrable pendent state law claims, and a stay of that arbitration pending judicial resolution of the federal securities claim. *Surman v. Merrill Lynch, Pierce, Fenner & Smith*,[8] 733 F.2d 59 (8th Cir.

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[8]In *Surman*, the Eighth Circuit reversed the order denying arbitration of the pendent state law claims, but remanded with the instruction that the sequence of arbitration and litigation should be ordered to promote "the most efficient resolution of the dispute between the parties". 733 F.2d at 63. This instruction seems to

1984); *Liskey v. Oppenheimer & Co., Inc.*, 717 F.2d 314 (6th Cir. 1983); *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638 (7th Cir. 1981). Bifurcated resolution has been justified on the grounds that it preserves the exclusive jurisdiction of the federal courts over Exchange Act claims, gives appropriate weight to the policy favoring arbitration codified in the Arbitration Act, and enforces the contractual agreement of the parties.

The "doctrine of intertwining" is a judicial creation which was developed in a series of Fifth Circuit cases.[7] The first of those cases was *Sibley v. Tandy Corp.*, 543 F.2d 540 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977). The facts in *Sibley* were dissimilar to those of the typical mixed arbitrable/nonarbitrable securities case,[8] but *Sibley* continues to be cited for the proposition that "when it is impracticable if not impossible to separate out non-arbitrable federal securities law claims from arbitrable contract claims, a court should deny arbitration in order to preserve its exclusive jurisdiction over the federal securities act claims." 543 F.2d at 543.

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be a non sequitur, in that earlier in the decision the Eighth Circuit approvingly referenced the Seventh Circuit's solution of controlling the sequence of the proceedings by adjudicating the securities claim prior to arbitration to avoid any possible collateral estoppel effect on the federal securities claim. *Id.* at 62.

[7]The concept appears to have originated, however, in earlier district court cases. See, *e.g.*, *Shapiro v. Jaslow*, 320 F.Supp. 598 (S.D.N.Y. 1970).

[8]While the typical mixed arbitrable/nonarbitrable claims case involves an Exchange Act claim and various pendent state law claims such as common law fraud, breach of contract, or breach of fiduciary duty asserted as independent claims all arising out of the same factual scenario, in *Sibley* the federal securities law claim was pled in the alternative, and was dependent on the resolution of the contractual dispute against the plaintiff. 543 F.2d at 544 n. 5. The Fifth Circuit therefore ordered that the contractual dispute be arbitrated and that trial of the federal securities claim and other pendent state claims be stayed pending resolution of the contractual dispute through arbitration.

Relying on *Sibley*, the Fifth Circuit expounded upon the "doctrine of intertwining" in *Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318, 335 (5th Cir. 1981):

> "The doctrine of intertwining was formulated as an exception to the requirement that arbitrable claims be referred to arbitration in order to preserve the exclusive jurisdiction of the federal courts in areas where such exclusivity exists...."

In a footnote to its decision, the *Miley* court noted that the defendant had never moved in the district court to have the pendent state claims severed and to stay the arbitration pending the completion of the federal trial. *Id.* at 336 n. 15. The defendant did raise this issue on appeal, but the *Miley* court, though admitting that such a procedure would preserve the exclusive jurisdiction of the federal courts over federal securities claims, rejected the notion relying, at least in part, upon considerations of efficiency. *Id.* at 336-37.

The intertwining doctrine was originally formulated, then, as a means of preserving the exclusive jurisdiction of the federal courts over Exchange Act claims. Confronted with a procedure which would preserve such jurisdiction, courts have justified the intertwining doctrine on the ground that bifurcated resolution would be inefficient. The denial of arbitration of pendent state law claims based on the purported inefficiency of bifurcation received its most cogent defense in *Cunningham v. Dean Witter Reynolds, Inc.*, 550 F.Supp. 578 (E.D.Cal. 1982). The court in *Cunningham* adopted the *Miley* result, if not its approach, and based that result in part upon its conclusion that Congress enacted the Arbitration Act solely for purposes of efficiency. By emphasizing the stated Congressional goals of avoiding the expense and delay of litigation through arbitration, the *Cunningham* court concluded that arbitration in a mixed arbitrable/

nonarbitrable claims dispute would disserve this Congressional goal.

> "I conclude that neither the language of the Arbitration Act nor the legislative history mandates the court to compel arbitration in this case. Congress intended to open an avenue for cheaper and faster settlement of disputes by making agreements to arbitrate enforceable in federal courts. Congress did not intend that court action on *all* arbitrable claims, regardless of their interconnection with non-arbitrable claims must be stayed and those claims submitted to arbitration. In this case the Congressional goal of avoiding litigation where arbitration would be cheaper and faster would be disserved if the court were to bifurcate the proceedings and compel arbitration of the pendent claims." 550 F.Supp. at 585 (emphasis in original).

The *Cunningham* court appears to advocate selective enforcement of arbitration clauses depending upon whether arbitration in the facts at hand would serve the Congressional goal of efficiency in dispute resolution. This conclusion, however, does not comport with the Arbitration Act language or legislative history emphasizing the Congressional goal of enforcement of contractual commitments, nor is such selective enforcement likely to lead to predictability and stability in the use of alternative dispute resolution mechanisms such as arbitration.

Selective enforcement of arbitration agreements based, in part, on the asserted justification of efficiency is also the procedure prescribed by the Ninth Circuit. In the instant case, *Byrd v. Dean Witter Reynolds, Inc.*, 726 F.2d 552, 554 (9th Cir. 1984) (App. A to the Pet. for Cert. at 4), the Ninth Circuit adopted the doctrine of interwining and concluded:

> "[W]hen there are arbitrable and nonarbitrable claims arising out of the same transaction, the district court should have discretion to evaluate the degree to which the claims are intertwined. If the district court determines that they are so intertwined that the purposes of the Arbitration Act and the protective intent of the federal securities laws would be frustrated by separating the claims, then it should refuse to separate them."[9]

The Ninth Circuit appears to regard efficiency as the primary "purpose" of the Arbitration Act.

A disconcerting aspect of the evolution of the intertwining doctrine, from concern for the exclusive jurisdiction of the federal courts over Exchange Act claims to concern for efficiency, is its purported grounding in this Court's analysis in *Wilko v. Swan*, 346 U.S. 427 (1953). In *Wilko*, this Court attempted to reconcile conflicting policies evidenced in two federal statutes — prompt, economical solutions to controversies through arbitration, as mandated by the Arbitration Act, versus protection of the rights of investors to choose their forum for dispute resolution, as granted in the Securities Act. This policy analysis, however, occurred in the context of a perceived conflict between the two statutes. 346 U.S. at 438. No such statutory conflict exists in the instant case. Here the mandate of the Arbitration Act and a judicially

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[9]Confronted with this issue in the context of federal antitrust claims, however, the Ninth Circuit in *Varo v. Comprehensive Designers, Inc.*, 504 F.2d 1103 (9th Cir. 1974), ordered arbitration of the plaintiff's pendent state claim and stayed arbitration of that claim pending adjudication of the federal antitrust claim in the district court. The district courts have held that federal antitrust claims, like federal securities claims, should not be submitted to arbitration. Similar results to that in *Varo* have occurred in other circuit courts of appeal in the antitrust context. See the cases cited in *Lee v. Ply*Gem Industries, Inc.*, 593 F.2d 1266 (D.C. Cir.), *cert. denied*, 441 U.S. 967 (1979), at 1274 n. 67 and accompanying text.

created doctrine — the doctrine of intertwining — conflict. Where a federal statute and judicially created procedure conflict, the judicial creation must fail and the federal statute prevail. Policy analysis, as engaged in *Wilko*, is not necessary or applicable.

Various courts which have adopted the doctrine of intertwining have nevertheless engaged in such policy analysis in justifying the doctrine by emphasizing the legislative history of the Arbitration Act reflecting Congressional approbation of the efficiency of arbitration. Even engaging in such policy analysis, this emphasis on efficiency is at the expense, and to the exclusion, of the legislative history demonstrating Congressional concern for the enforcement of contractual rights. The selective enforcement of arbitration agreements which results from the doctrine of intertwining is clearly contrary to this demonstrable concern.

B. Arbitration of Pendent State Law Claims Will Not Adversely Affect the Protective Intent of the Federal Securities Laws.

Bifurcated resolution of mixed arbitrable/nonarbitrable securities claim cases as a mandatory procedure was first adopted by a circuit court of appeals in *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638 (7th Cir. 1981). In *Dickinson*, the plaintiff filed a complaint containing a nonarbitrable federal securities law claim and three pendent claims alleging various state law tort and contract theories. The Seventh Circuit reversed the district court order denying defendant's motion to compel arbitration and held that where nonarbitrable federal securities claims are joined with claims subject to a valid arbitration agreement, a district court must bifurcate the federal and state claims, order arbitration of the state claims, and stay arbitration of the state claims pending resolution of the federal securities claim. 661 F.2d at 646. This was the

precise relief requested by Dean Witter in the instant case (J.A. 12).

Those cases denying arbitration of pendent state law claims based on the intertwining doctrine, in the words of the *Dickinson* court, "seem not to have given appropriate weight to the federal policies embodied in the Federal Arbitration Act", 661 F.2d at 645, particularly the contractual right to arbitration. An appropriately fashioned order for bifurcated resolution, however, preserves the contractual right to arbitration as well as the "exclusive jurisdiction" of the federal courts over Exchange Act claims. As explained by the court in *Dickinson*:

> "[A] federal court has the sole right to decide the ultimate issues essential to a federal securities law claim. If arbitration of an 'intertwined' state claim preceded the federal proceeding, the federal forum might find itself bound through collateral estoppel.
>
> *"But, this threat to the jurisdiction of the federal courts does not justify denying arbitration of otherwise arbitrable intertwined state law claims.* [Citation omitted.] Where the non-arbitrable issues substantially permeate the entire case and make it difficut to separate out the arbitrable issues, the district court has discretion to *stay* arbitration pending judicial resolution of the non-arbitrable claims. [Citation omitted.] By controlling the order of the two adjudications . . . the district court can preserve its full authority to decide the non-arbitrable federal issues without any collateral estoppel consequences from a prior arbitration." 661 F.2d at 643-44 (emphasis added).

The Ninth Circuit in the instant case rejected the *Dickinson* approach, in part out of the fear that such a procedure could "frustrate the intent of the federal securities laws to preserve access to the federal courts"

(*citing Wilko v. Swan*), and because "[t]he 1925 Arbitration Act certainly did not anticipate the Supreme Court's 1953 determination that the protective intent of federal securities laws was to take priority over the economic advantages of arbitration" (*citing Wilko v. Swan*). Nowhere in its opinion, however, does the Ninth Circuit articulate how the *Dickinson* approach frustrates this protective intent. Quite to the contrary, ordering judicial resolution of the federal securities claim prior to arbitration of any pendent state law claims both preserves that intent and upholds the mandate of the Arbitration Act by enforcing arbitration as to clearly arbitrable claims.[10]

[10]The courts in *Miley v. Oppenheimer & Co., Inc.*, 637 F.2d at 336-37, and *Cunningham v. Dean Witter Reynolds, Inc.*, 550 F. Supp. at 584 n. 7, raise the additional argument that bifurcation may result in the voluntary dismissal of either the state law claims, thereby undercutting the purpose and policy of pendent jurisdiction, or the federal claim, defeating the purpose of exclusive jurisdiction of the federal courts over such claims. Not only are such dismissals mere speculation, but concern for such dismissals would be ill-founded.

Pendent jurisdiction concerns the power of a federal court, in its discretion, to hear state and federal claims which derive from a "common nucleus of operative fact" if ordinarily they would be tried all in one judicial proceeding. "Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, [citation omitted]." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26 (1966). "Fairness" is certainly not present if pendent state law claims are retained for judicial resolution in cases where they are subject to a valid arbitration agreement. Further, as a discretionary policy of the federal courts, pendent jurisdiction must yield to the mandate for enforcement of arbitration agreements codified in the Arbitration Act.

The specter of dismissals of federal securities claims is similarly illusory. The *Cunningham* court warns that such dismissals may be made by plaintiffs "hoping for faster and cheaper results through arbitration". Those are two of the purposes of arbitration. In any event, at least as likely a possibility is a stipulation to arbitrate the federal securities claim. Such post-dispute agreements to arbitrate can be made in any case, and the exclusive jurisdiction issue has not prevented their enforcement. See, e.g., *Gardner v.*

C. Bifurcation Is More Efficient Than Judicial Retention and Resolution of Pendent State Law Claims.

The refusal of many courts to sever and compel arbitration of arbitrable state law claims appended to a non-arbitrable Exchange Act claim is based on the alleged inefficiency of the procedure. Because of its alleged inefficiency, bifurcated resolution is said to be counter to the purposes of the Arbitration Act.[11]

It is not at all clear, however, that bifurcation will result in either duplication or inefficiency. The Seventh Circuit considered the efficiency argument in *Dickinson* and noted that since arbitration of the pendent state law claims would be stayed pending trial of the plaintiff's federal securities claim, issues resolved in the trial in the district court also would be resolved with respect to the subsequent arbitration. As stated by the Seventh Circuit:

> "If there is a bench trial, detailed findings of fact . . . should eliminate much of the duplication through the impact of collateral estoppel on the subsequent arbitration. [Citations omitted.] If plaintiffs seek a jury trial, a special verdict should accomplish the same purpose. In addition, plaintiffs who prevail in federal court may have no need to pursue their arbitrable claims because they will have already recovered their damages. [Citation omitted.] Or they may even settle those claims based on the facts developed at their federal trials. All of these possibili-

Shearson, Hammill & Co., 433 F.2d 367, 368 (5th Cir. 1970), *cert. denied*, 401 U.S. 978 (1971); *Moran v. Paine, Webber, Jackson & Curtis, Inc.*, 389 F.2d 242, 246 (3d Cir. 1968); *Fischer v. New York Stock Exchange*, 408 F.Supp. 745, 749 (S.D.N.Y. 1976).

[11]See, e.g., *Byrd v. Dean Witter Reynolds, Inc.*, 726 F.2d 552, 554 (9th Cir. 1984); *Cunningham v. Dean Witter Reynolds, Inc.*, 550 F.Supp. 578, 585 (E.D.Cal. 1982).

ties render the alleged inefficiency somewhat speculative." 661 F.2d at 644 (footnote omitted).

See also, Pross v. Baird, Patrick & Co., Inc., [1983-84 Transfer Binder] Fed.Sec.L.Rep. (CCH, ¶99,438, at 96,497 (S.D.N.Y. August 1, 1983); *Todd v. Oppenheimer & Co., Inc.*, 78 F.R.D. 415, 426-27 (S.D.N.Y. 1978).

It appears, however, that bifurcated resolution of mixed arbitrable/nonarbitrable claims cases may be more efficient than the judicial resolution of all claims resulting from application of the intertwining doctrine. A clear benefit of bifurcated resolution is the simplification of issues in the trial court as to burden of proof, levels of proof, and cautionary instructions. This benefit was identified by the appellants and acknowledged by the Sixth Circuit in *Liskey v. Oppenheimer & Co., Inc.*, 717 F.2d 314, 320 (6th Cir. 1983). Expedited resolution of issues in the trial court will also save litigants attorneys' fees they would otherwise incur for proof of the various elements of state law claims and preparation of state law jury instructions. The reduction in the number of days required for trial will relieve overburdened, congested federal courts while at the same time permitting trial of the federal securities claim or claims truly belonging in federal court.

All of these factors suggest that the inefficiency attributed to bifurcated resolution has been exaggerated, and that employing arbitration for the arbitrable claims in mixed claims cases in fact may be more efficient than individual retention and resolution of all of the claims. In any event, as the *Dickinson* court concluded, any duplication of effort would be insufficient to destroy the "right to arbitration". 661 F.2d at 644.

III.

DISTRICT COURT DISCRETION TO RETAIN ARBITRABLE PENDENT STATE LAW CLAIMS FOR JUDICIAL RESOLUTION UNDERMINES THE ARBITRATION ACT AND CONFLICTS WITH RECENT DECISIONS OF THIS COURT.

A. Skillful Pleading Will Permit Litigation of State Law Claims in the Federal Courts When Those Claims Properly Belong in Arbitration.

Allowing the federal district courts discretion to retain pendent state law claims subject to an arbitration agreement for judicial resolution will permit litigation of state law claims in the federal courts when those claims properly belong in arbitration. The mere assertion of a "colorable" federal securities claim may enable a plaintiff to avoid his or her contractual obligation to arbitrate claims based on state law, if the district court exercises its discretion under the Ninth Circuit decision in this case to retain arbitrable state law claims for judicial resolution.

A "colorable" federal securities claim is possible under the liberal pleading rules of the federal courts since "fair notice" of a claim is all that is required, *Conley v. Gibson*, 335 U.S. 41, 47-48 (1957); Fed.R.Civ.P. 8(a). It thus may frequently be the case, as the court found in *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977), that the securities law claim is "the rather small tail to a much larger dog".

With notice pleading, the specious nature of a federal claim may not be apparent until after extensive discovery or even a lengthy trial, as in *Sibley*. The means of assuring that a federal securities law claim has not been pled merely to avoid arbitration of arbitrable claims is to require arbitration of those claims, whether or not a nonarbitrable claim is pled.[12]

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[12] Avoiding arbitration, for example, may have been the intent of the plaintiff in alleging a federal securities law violation in *Kershaw*

Further, although it may be argued that a district court will not retain pendent state law claims in every case since the court has discretion to evaluate the degree to which the claims are factually intertwined, in practice this "discretion" will invariably permit retention of pendent state law claims and a denial of arbitration. Any claims which have the "common nucleus of operative fact" required for the exercise of pendent jurisdiction[13] are intertwined sufficiently to avoid arbitration under the intertwining doctrine as applied by the Ninth and Fifth Circuits. The Fifth Circuit acknowledged this to be the case in *Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318, 335 (5th Cir. 1981):

> "[I]n order for a state claim to be properly pendent to a federal claim, the evidentiary facts underlying the two claims must be largely identical. Refusing to order arbitration whenever such evidentiary facts are intertwined would mean that pendent state claims would almost never be submitted to arbitration, and would largely undermine the clear mandate of the United States Arbitration Act."

Still fearing possible collateral estoppel impact on a federal court from a prior arbitration, the *Miley* court nevertheless attempted to distinguish common evidentiary fact situations from common "ultimate" fact situations requiring similar factual and legal conclusions, and held that in the latter arbitration of pendent

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v. Dean Witter Reynolds, Inc., No. 83-5902 (9th Cir. April 2, 1984) (available on LEXIS, Genfed library Cir. file). In *Kershaw*, the plaintiffs voluntarily and inexplicably dismissed their federal securities claim on the very eve of trial. The defendant thereupon moved for a stay of the action pending arbitration of the remaining state law claims. The Ninth Circuit reversed the United States Magistrate's denial of that motion, reasoning that the policies of the intertwining doctrine were no longer of concern. Slip. Op. at 3.

[13] *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

state law claims should be denied. *Id.* at 335-36. The Ninth Circuit does not require that district courts attempt this difficult and subtle distinguishment.

The Seventh Circuit in *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638 (7th Cir. 1981), opined that the *Miley* "ultimate facts" distinction was too subtle for the securities law context where "skillful pleading will always produce enough intertwining between state law fraud and misrepresentation claims and the non-arbitrable federal securities claim to defeat arbitration", 661 F.2d at 646 (footnote omitted). The *Dickinson* court concluded that the intertwining doctrine thus would become "the exception that swallowed the rule" by allowing the presence of a nonarbitrable claim to force a trial on the otherwise arbitrable claims. *Id.* at 645-46. The intertwining doctrine thus undermines the Arbitration Act by allowing skillful pleading to prevent the enforcement of arbitration agreements. Such a result is directly contrary to the very purpose for the enactment of the Arbitration Act.

B. District Court Discretion to Retain Arbitrable Pendent State Law Claims for Judicial Resolution Promotes Forum Shopping.

The Ninth Circuit decision in the instant case, and the decisions of other courts of appeal permitting district courts discretion to retain arbitrable state law claims for judicial resolution, make the right to enforce an arbitration contract dependent on the particular forum in which it is asserted. Common law and statutory state law claims brought in state court and subject to an arbitration agreement are regularly ordered to arbitration,[14] while those

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[14] See, e.g., *Southland Corp. v. Keating*, 104 S.Ct. 852, 79 L.Ed. 2d 1 (1984); *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street*, 35 Cal.3d 312, 197 Cal.Rptr. 581 (1983); *Parr v. Superior Court*, 139 Cal.App.3d 440, 188 Cal.Rptr. 801 (1983); *Vernon v. Drexel Burnham & Co.*, 52 Cal.App.3d 706, 125 Cal.Rptr. 147 (1975).

same claims, if appended to a federal securities claim, may be retained in the district courts for judicial resolution. This disparate treatment of arbitrable state law claims may stimulate forum shopping for the purpose of avoiding arbitration.

The problem of forum shopping in the context of arbitration agreements was addressed in *Southland Corp. v. Keating*, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). In *Keating* this Court upheld arbitration pursuant to contract in the face of a conflicting California statute. This Court noted that the California Supreme Court's interpretation of the Arbitration Act in *Keating* would encourage forum shopping:

> "We are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." 104 S.Ct. at 860, 79 L.Ed.2d at 15.

Since the district courts possess discretion to retain arbitrable claims for judicial resolution under the Ninth Circuit decision in the instant case, the right to enforce an arbitration agreement is similarly dependent on the forum in which it is asserted. The proper approach, mandated by the Sixth and Seventh Circuits, requires severance and arbitration of arbitrable pendent state law claims, and a stay of arbitration pending adjudication of any nonarbitrable federal claim. Such bifurcated resolution is not conducive to the forum shopping possible under the intertwining doctrine, and will prevent the filing of actions in federal court solely for the purpose of avoiding arbitration.

C. District Court Discretion to Retain Arbitrable State Law Claims for Judicial Resolution Conflicts With Recent Decisions of This Court.

Two recent decisions of this Court concerning enforcement of arbitration agreements underscore the strong federal policy favoring arbitration and the mandate of Congress codified in the Arbitration Act and require a reversal of the Ninth Circuit decision in the instant case. Although not directly addressing the instant issue, in *Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.*, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), this Court approved of bifurcation of disputes in order to give effect to arbitration agreements and appeared to sanction the result in *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638 (7th Cir. 1981). In *Southland Corp. v. Keating*, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), this Court again upheld the sanctity of contractual agreements to arbitrate disputes.

In *Cone*, a contractor sought arbitration of its dispute with a hospital by a petition in federal district court. The hospital, however, had previously filed an action in state court against the contractor and the independent architect hired by the hospital, seeking a declaratory judgment that the contractor had no right to arbitration, that the hospital was not liable to the contractor, and that if it was liable it was entitled to indemnity from the architect. The Fourth Circuit reversed the district court order staying the federal court suit pending resolution of the state court action and remanded with instructions to enter an order to arbitrate.

In affirming the decision of the Fourth Circuit, this Court rejected the hospital's argument that arbitration should be denied because the dispute also involved the architect, with whom no agreement to arbitrate existed:

"It is true . . . that if Mercury obtains an arbitration order for its dispute, the Hospital will be forced to resolve these related disputes in different forums. That misfortune, however, is not the result of any choice between the federal and state courts; it occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. [footnote omitted.]" 103 S.Ct. at 939, 74 L.Ed.2d at 782 (emphasis in original).

The bifurcation required when persons are present in litigation who are parties to an underlying dispute but not to an arbitration agreement, as in *Cone*, is analogous to the bifurcated resolution ordered in *Dickinson* due to the presence of a nonarbitrable claim with arbitrable pendent state law claims. In fact, this Court in *Cone* cited *Dickinson* in concluding that doubts should be resolved in favor of arbitration when considering any "defense to arbitrability":

"[T]he courts of appeal have . . . consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability. [Footnote omitted.]" *Id.* at 941-42, 74 L.Ed.2d at 785.

In *Keating*, this Court considered the enforceability in state court of an agreement to arbitrate a claim brought under a state statute. The statute, the California Franchise Investment Law, appeared to invalidate agreements to arbitrate such claims. In concluding that the California law conflicted with the Arbitration Act and therefore violated the Supremacy Clause, this Court noted that "[p]lainly the effect of the judgment of the California court is to nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration.... Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts." 104 S. Ct. at 856, 79 L.Ed.2d at 10. The Ninth Circuit's decision in the instant case both nullifies the valid contract of the parties and permits the plaintiff to litigate arbitrable claims, as did the decision of the Supreme Court of California overturned by this Court in *Keating*.

This Court's analyses in *Cone* and *Keating* are applicable to the instant case and appear to mandate a result contrary to that of the Ninth Circuit. A reversal of the Ninth Circuit's decision in the instant case thus would be a proper exercise of this Court's power of supervision.

IV.

CONCLUSION.

Dean Witter contends that the correct approach for a district court faced with a motion to compel arbitration in a mixed arbitrable/nonarbitrable claims case is that requested by Dean Witter in the district court in the instant case: severance and arbitration of the pendent state law claims, and a stay of that arbitration pending adjudication of the nonarbitrable Exchange Act claim retained in the district court. Such bifurcated resolution both preserves the exclusive jurisdiction of the federal courts over Exchange Act claims and enforces the contractual agreement of the parties as to arbitrable claims.

Bifurcated resolution also prevents forum shopping. Under the intertwining doctrine a party may avoid the contractual obligation to arbitrate pendent state law claims by joining them in a complaint filed in federal district court with a federal securities law claim. Bifurcated resolution, however, will require arbitration of state law claims subject to an arbitration agreement whether those claims are brought in state or federal court. Fewer specious federal securities law claims will be filed, which will reduce congestion in the courts, since arbitrable claims pendent to such claims will be arbitrated rather than judicially resolved.

The holding in *Wilko v. Swan*, 346 U.S. 427 (1953), was acknowledged to be a limited exception to the mandate of the Arbitration Act and the broad federal policy favoring arbitration of disputes pursuant to contractual agreements. To further refuse to enforce arbitration agreements merely because of the joinder of a nonarbitrable federal securities law claim entails the grafting of a judicial exception onto a judicial exception. Such a result is not warranted by the language or legislative history of

the Arbitration Act, nor does it conform to this Court's recent decisions in *Cone* and *Keating*, *supra*.

The Seventh Circuit found no discretion to exist in the district court when confronted with the issue in the instant case.[13] Dean Witter likewise contends that no discretion exists in the district court with respect to this issue, and that as a result, the district court committed an error of law in the instant case by denying Dean Witter's motion to compel arbitration. That error of law was affirmed on appeal by the Ninth Circuit. Dean Witter therefore respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Ninth Circuit and remand this matter to the Ninth Circuit, with the order that the district court sever and order arbitration of Byrd's state law claims, and stay that arbitration pending judicial resolution of his Exchange Act claim.

DATED: July 24, 1984

Respectfully submitted,

EUGENE W. BELL,
Counsel of Record; and
KEVIN K. FITZGERALD,
JONES, BELL, SIMPSON & ABBOTT,
Attorneys for Petitioner.

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[13] *Dickinson v. Heinold Securities, Inc.*, 661 F.2d at 646.

AMICUS CURIAE

BRIEF

MOTION FILED

JUL 30 1984

No. 83-1708

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DEAN WITTER REYNOLDS INC.,

Petitioner,

v.

A. LAMAR BYRD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF REVERSAL

JOSEPH G. RIEMER, III
Counsel of Record; and
JUDITH WELCOM
PAUL WINDELS III
BROWN, WOOD, IVEY, MITCHELL & PETTY
One World Trade Center
New York, New York 10048
(212) 839-5300

Attorneys for
SECURITIES INDUSTRY ASSOCIATION, INC.
MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED
DREXEL BURNHAM LAMBERT INCORPORATED
MOSELEY, HALLGARTEN, ESTABROOK & WEEDEN INC.
SUTRO & CO. INCORPORATED
DOMINICK & DOMINICK, INCORPORATED

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IN THE

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OCTOBER TERM, 1983

DEAN WITTER REYNOLDS INC.,

Petitioner,

v.

A. LAMAR BYRD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THE SECURITIES INDUSTRY ASSOCIATION, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, DREXEL BURNHAM LAMBERT INCORPORATED, MOSELEY, HALLGARTEN, ESTABROOK & WEEDEN INC., SUTRO & CO. INCORPORATED, AND DOMINICK & DOMINICK, INCORPORATED, FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Securities Industry Association, Inc. ("SIA"), Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), Drexel Burnham Lambert Incorporated ("Drexel"), Moseley, Hallgarten, Estabrook & Weeden Inc. ("Moseley"), Sutro & Co. Incorporated ("Sutro"), and Dominick & Dominick, Incorporated ("Dominick & Dominick"), hereby respectfully move, pursuant to Rule 42 of this Court, for leave to file the annexed brief as *amici curiae* urging reversal of the decision below of the United States Court of Appeals for the Ninth Circuit. The consent of Dean Witter Reynolds Inc., the

Petitioner, has been obtained. Consent of the Respondent has been requested but was not granted.

The SIA is the principal trade association of the securities industry. It has as members more than five hundred securities firms in the United States and Canada. As such, it has a substantial interest in the extent to which agreements between securities firms and their customers to arbitrate claims may be enforced. Most of the SIA's members, in the belief that arbitration is a fair and economical manner of resolving disputes, have agreed with many of their customers to arbitrate any controversies arising between them. Among these members are *amici curiae* Merrill Lynch, Drexel, Moseley, Sutro, and Dominick & Dominick. The *amici curiae* therefore take a deep interest in this Court's resolution of a question it expressly left open in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974), whether the rule of *Wilko* v. *Swan*, 346 U.S. 427 (1953), applies to the implied private right of action under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), and also that of the validity of the so-called "intertwining doctrine", on which the federal circuit courts are divided. The *amici* also seek to clarify and make uniform the law on these issues in the hope that they might thereby more precisely set forth the ambit of any arbitration provisions in agreements with their customers.

The *amici curiae* firmly believe that the Ninth Circuit erred below in two respects. First, it assumed that *Wilko* v. *Swan*, *supra*, voided agreements to arbitrate future claims brought under Section 10(b) of the Exchange Act, even though Section 2 of the United States Arbitration Act (the "Arbitration Act"), 9 U.S.C. § 2, would make them as enforceable as any other contract. Section 10(b) lacks the special characteristics of Section 12(2) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77*l*(2), that were the catalyst of *Wilko*: the novel and express cause of action created by Section 12(2) and the broad choice of forum afforded to plaintiffs thereunder by Section 25 of the Securities Act, 15 U.S.C. § 77y. The substantive federal policy favoring arbitration as a means of relieving parties of the burdens of litigation and the federal courts of overladen dockets suggests that *Wilko* should not be extended to cover implied rights of action under Section 10(b). Second, the Ninth Circuit erroneously refused to sever Respondent's pendent state law claims for submission to arbitration because of the "intertwining doctrine". Yet this doctrine is based on fallacious legal reasoning that flouts the plain meaning and the legislative purpose of the Arbitration Act. While purporting to serve judicial economy, it encourages sharp pleading of claims under Section 10(b) in order to insulate disputes between brokers and customers from valid agreements to arbitrate.

WHEREFORE, the Securities Industry Association, Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Drexel Burnham Lambert Incorporated, Moseley, Hallgarten, Estabrook & Weeden Inc., Sutro & Co. Incorporated, and Dominick & Dominick, Incorporated, respectfully move this Court that leave be granted them to file the brief as *amici curiae*.

Dated: July 26, 1984

Respectfully submitted,

/s/ Joseph G. Riemer, III

JOSEPH G. RIEMER, III
Counsel of Record; and
JUDITH WELCOM
PAUL WINDELS III
BROWN, WOOD, IVEY,
MITCHELL & PETTY
One World Trade Center
New York, New York 10048
(212) 839-5300

Attorneys for Amici Curiae

Of Counsel:

William J. Fitzpatrick, Esq.

SECURITIES INDUSTRY ASSOCIATION, INC.

Daniel A. Dolan, Esq.
Eric Rosenberg, Esq.

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED

Paul A. Merolla, Esq.

DREXEL BURNHAM LAMBERT INCORPORATED

Kevin J. Moynihan, Esq.

MOSELEY, HALLGARTEN, ESTABROOK & WEEDEN INC.

Daniel B. Sullivan, Esq.

SUTRO & CO. INCORPORATED

Robert C. Harrison, Esq.

DOMINICK & DOMINICK, INCORPORATED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1708

DEAN WITTER REYNOLDS INC.,

Petitioner,

v.

A. LAMAR BYRD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

PRELIMINARY STATEMENT

The Securities Industry Association, Inc. ("SIA") Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), Drexel Burnham Lambert Incorporated ("Drexel"), Moseley, Hallgarten, Estabrook & Weeden Inc. ("Moseley"), Sutro & Co. Incorporated ("Sutro"), and Dominick & Dominick, Incorporated ("Dominick & Dominick"), submit this brief as *amici curiae* in support of the Petitioner, and urge this Court to reverse the opinion and judgment of the United States Court of Appeals for the Ninth Circuit below in *Byrd* v. *Dean Witter Reynolds Inc.*, 726 F.2d 552 (9th Cir. 1984).

INTEREST OF *AMICI CURIAE*

The SIA is the principal trade association of the securities industry. It has as members more than five hundred securities firms in the United States and Canada. It therefore has a substantial interest in the extent to which agreements between securities firms and their customers to arbitrate claims may be enforced. Most of the SIA's members believe that arbitration offers a just and efficient way to resolve disputes between securities firms and their customers, and have accordingly entered into agreements to arbitrate with their customers. Among these members are *amici curiae* Merrill Lynch, Drexel, Moseley, Sutro, and Dominick & Dominick. The validity and scope of these agreements to arbitrate is a frequent issue in litigation involving the *amici curiae* and many other members of the SIA as well. Hence, the Court's decision on whether predispute agreements to arbitrate may be enforced with respect to Section 10(b) claims and claims pendent thereto will have a substantial effect upon the *amici curiae* and their dealings with their customers. The *amici curiae* also seek to clarify and make uniform the law on these issues in the hope that they might thereby more precisely set forth the ambit of any arbitration provisions in agreements they reach with their customers.

The *amici curiae* firmly believe that the Ninth Circuit erred below in two respects. First, it assumed that *Wilko* v. *Swan*, 346 U.S. 427 (1953), voided agreements to arbitrate future claims brought under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), even though Section 2 of the United States Arbitration Act (the "Arbitration Act"), 9 U.S.C. § 2, would make them as enforceable as any other contract. Section 10(b) of the Exchange Act lacks the special characteristics of Section 12(2) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77*l*(2), that were the catalyst of *Wilko*: the novel and express cause of action created by Section 12(2) and the broad choice of forum afforded to plaintiffs thereunder by Section 22 of the

Securities Act, 15 U.S.C. § 77v. The substantive federal policies favoring arbitration as a means of relieving parties of the burdens of litigation and the federal courts of overladen dockets suggest that *Wilko* should not be extended to bar arbitration of implied rights of action under Section 10(b). Second, the Ninth Circuit did not sever Respondent's pendent state law claims for submission to arbitration because of the "intertwining doctrine". Yet this doctrine rests on faulty legal reasoning that flouts the plain meaning and the legislative purpose of the Arbitration Act. Under the guise of saving litigants' time, it in fact encourages spurious claims under Section 10(b), artfully pleaded so as to prevent the enforcement of agreements to arbitrate.

SUMMARY OF ARGUMENT

The United States Arbitration Act, 9 U.S.C. § 1 *et seq*. (the "Arbitration Act"), renders enforceable all arbitration agreements in contracts involving interstate commerce. Certiorari was granted in this case to review the question whether Respondent should be released from his predispute agreement to arbitrate the pendent claims he asserted with his claim under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), under the so-called "intertwining doctrine". As an alternative to deciding this case on the grounds asserted by Petitioner, this Court may also answer that question in the negative by resolving the question it expressly left open in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 515 (1974), and holding that *Wilko* v. *Swan*, 346 U.S. 427 (1953), may not be extended to nullify predispute agreements to arbitrate Section 10(b) claims.

Wilko does not, in and of itself, apply to Section 10(b) claims. *Scherk* v. *Alberto-Culver Co.*, *supra*. Although this Court has held that Section 14 of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77n, creates an exception to the Arbitration Act for claims under Section 12(2) of the Securities Act, *Wilko* v. *Swan*, *supra*, this exemption should

not be extended to judicially inferred rights of action under Section 10(b) of the Exchange Act. Unlike the express remedies in the Securities Act, the implied cause of action under Section 10(b) does not involve congressionally created "special rights". Accordingly, the concerns the *Wilko* Court found so significant as to require access to a judicial forum and an exception to the Arbitration Act are not present in cases arising under Section 10(b).

Application of the Arbitration Act to claims brought under Section 10(b) would also serve the important federal policy favoring arbitration as a means of relieving the federal courts of their overcrowded dockets. In the absence of legislative intent to curtail the Arbitration Act by the passage of Section 10(b) of the Exchange Act, the Exchange Act should not be held to have repealed the Arbitration Act by implication with regard to private claims brought under Section 10(b).

The practice of exempting pendent state and common law claims from the Arbitration Act under the so-called "intertwining doctrine" merely because they are joined with claims under Section 10(b) has no justification under federal law. The plain language and the legislative purpose of the Arbitration Act compel the arbitration of these pendent claims, and the Arbitration Act preempts any state law to the contrary under the Supremacy Clause of the United States Constitution. Unlike the Securities Act claims considered in *Wilko*, the exemption of state and common law claims from arbitration serves no federal policy that justifies disregard of the applicability of the Arbitration Act. Moreover, significant public policy considerations, such as freeing the federal courts from unnecessary litigation and the enforceability of contracts in general, militate against this "intertwining doctrine".

ARGUMENT

I.

CLAIMS UNDER SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934 ARE ARBITRABLE PURSUANT TO THE UNITED STATES ARBITRATION ACT.

In *Wilko* v. *Swan*, 346 U.S. 427 (1953), this Court ruled that a party asserting a claim arising under Section 12(2) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77*l*(2), could not be compelled to submit his claims to arbitration. The Court reached this decision notwithstanding the existence of an otherwise valid arbitration agreement. The Court concluded that Section 14 of the Securities Act, 15 U.S.C. § 77n, which voids any agreement to waive compliance with the provisions of that Act, implicitly repealed the United States Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "Arbitration Act"), insofar as that Act would have required enforcement of the agreement to arbitrate.[1]

The lower federal courts have generally assumed, without expressly so holding, that the rationale underlying this Court's decision in *Wilko* bars arbitration of any federal securities law claims. Thus, district courts and circuit courts of appeal have refused to require claims under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), to be submitted to arbitration.[2] Certain courts have carried this assumption beyond the federal securities laws. Those courts, including the Ninth Circuit in its decision below, have held, under the guise of the so-called "intertwining

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1 The Court found that the agreement to arbitrate constituted a waiver of Section 22 of the Securities Act, 15 U.S.C. § 77v, which provides that suits to enforce any liability arising under the Act may be heard by the federal district courts or in any state court of competent jurisdiction.

2 *See* cases cited at n.7, *infra*, p. 10.

doctrine", that pendent state or common law claims based on the same facts that give rise to a Section 10(b) claim may not be arbitrated. *Byrd* v. *Dean Witter Reynolds Inc.*, 726 F.2d 552 (9th Cir. 1984). The Ninth Circuit's decision below thus glosses over the question expressly left open by this Court in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 515 (1974): whether the Exchange Act invalidates predispute agreements to submit claims involving alleged violations of Section 10(b) to arbitration.[3] That question is squarely presented on this writ of certiorari. If, as the *amici curiae* contend, Section 10(b) claims are arbitrable under the Arbitration Act, there is no non-arbitrable claim with which Respondent's pendent claims may be "intertwined". Accordingly, the question whether the "intertwining doctrine" has any viability under federal law need not be reached.

The *amici curiae* submit that the Ninth Circuit and the other lower federal courts have erred in their assumption that *Wilko* bars arbitration of Section 10(b) claims. Scrutiny of the judicially inferred remedies under Section 10(b) of the Exchange Act reveals none of the aspects of the express remedies created by the Securities Act that led this Court to adopt the rationale underlying its ruling in *Wilko* v. *Swan*. Rather, the vital federal policy manifested in the Arbitration Act, to resolve disputes by arbitration as an antidote to clogged federal court dockets, undermines any tenuous argument under *Wilko* that the Exchange Act may be read to exempt claims under Section 10(b) from arbitration.

Agreements to arbitrate future claims under Section 10(b) are, absent some congressional exemption, plainly within the ambit of the Arbitration Act when the parties have entered into a valid agreement to arbitrate. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 511. There is no question that agreements to arbitrate contained in margin or other agreements between public cus-

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3 In *Scherk*, the Court noted that "a colorable argument could be made that even the semantic reasoning of the *Wilko* opinion does not control the case before us." 417 U.S. at 513.

tomers and their brokers are contracts involving transactions in interstate commerce and are within the scope of Section 2 of the Arbitration Act.[4] *Macchiavelli* v. *Shearson, Hammill & Co.*, 384 F. Supp. 21 (E.D. Cal. 1974). That Section applies to arbitration provisions contained "in any maritime transaction or a contract evidencing a transaction involving [interstate or foreign] commerce". 9 U.S.C. § 2. A claim under Section 10(b) must be predicated upon "the use of any means or instrumentality of interstate commerce or the mails, or any facility of any national securities exchange." 15 U.S.C. § 78j(b). A Section 10(b) claim arising between parties bound by an arbitration agreement therefore qualifies as "a controversy thereafter arising out of such contract or transaction" under the Arbitration Act. 9 U.S.C. § 2. Inasmuch as the Arbitration Act on its face requires that agreements to arbitrate claims under Section 10(b) be enforced, the threshold issue for consideration is whether the Exchange Act or some other congressional pronouncement exempts such claims from arbitration.

The conclusion, implicit in the Ninth Circuit's decision below, that Section 10(b) claims are exempt from arbitration requires a finding that the Exchange Act, by implication, has repealed the Arbitration Act insofar as the latter requires that claims under Section 10(b) be arbitrated. No such determination can be justified here. "[R]epeals by implication [of a prior statute by a subsequently enacted one] are disfavored", *Kaiser*

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4 Section 2 of the Arbitration Act provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> 9 U.S.C. § 2.

Steel Corp. v. *Mullins*, 455 U.S. 72, 88 (1981). Under the applicable federal standard:

> In the absence of some affirmative showing of an intention by Congress to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.

Morton v. *Mancari*, 417 U.S. 535, 550 (1974). The Arbitration Act and Section 10(b) are not irreconcilable. Moreover, there simply is nothing in the legislative history of the Exchange Act that reveals an intention by Congress to repeal the Arbitration Act insofar as it pertains to claims under Section 10(b).

The Court in *Wilko* refused to enforce an arbitration clause with respect to a claim under Section 12(2) as a "condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of [the Securities Act]", which was therefore void under Section 14. Section 12(2) "created a special right to recover for misrepresentation which differs substantially from the common law action in that the seller is made to assume the burden of proving lack of *scienter*." 346 U.S. at 431. Since Section 22 of the Securities Act, 15 U.S.C. § 77v, made that "special right" "enforceable in any court of competent jurisdiction—federal or state", *id.*, the Court reasoned, that to compel arbitration would require waiver of compliance with the broad choice of forum that Section 22 provides to aggrieved purchasers.

The Court further found that arbitrators, as a matter of federal law, are not subject to "judicial instruction on the law", 346 U.S. at 436, and need give no explanation of their award. It observed that these circumstances led to the result that the arbitrators' "conception of the legal meaning of such statutory requirements as 'burden of proof', 'reasonable care' or 'material fact' . . . cannot be examined . . . ." The Court therefore concluded that to require arbitration of Section 12(2)

claims would endanger the "special rights" created therein. 346 U.S. at 436.[5]

By contrast, Section 10(b) contains none of the unique provisions on which the reasoning of *Wilko* is founded. Section 12(2) "*created* a special right" (emphasis supplied) in that it provided a congressionally designed, express private right of action to an aggrieved purchaser of securities. *See Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 209-10 (1976); *Wilko* v. *Swan*, 346 U.S. at 431. Section 10(b) does not provide an express private right of action and contains none of the "carefully drawn procedural restrictions", *Ernst & Ernst* v. *Hochfelder*, *supra*, 425 U.S. at 210, present in the express remedies set forth in the Securities Act and the Exchange Act. The private right of action under Section 10(b) is the creation of the lower federal courts, to which this Court has acquiesced. *Herman & MacLean* v. *Huddleston*, ___ U.S. ___, 103 S. Ct. 683 (1983).[6]

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5 Justice Frankfurter disputed these contentions. In his dissent, he observed:

> "There is nothing in the record before us, nor in the facts of which we can take judicial notice, to indicate that the arbitral system as practiced in the City of New York, and as enforceable under the supervisory authority of the District Court for the Southern District of New York, would not afford the plaintiff the rights to which he is entitled."

346 U.S. at 439 (Frankfurter, J., dissenting).

6 Because of the history of recognition by the lower federal courts of a private cause of action under Section 10(b), "the existence of this implied remedy is simply beyond peradventure." *Herman & MacLean* v. *Huddleston*, ___ U.S. ___, 103 S. Ct. 683, 687 (1983). Other than noting the failure of Congress to deny a private right of action under Section 10(b) during its numerous amendments of the Exchange Act, a point which often holds little significance in matters of statutory interpretation, *see Girouard* v. *United States*, 328 U.S. 61 (1946), the Court did not examine the legislative intent of Congress in enacting Section 10(b), the critical test for determining whether a right of action is implicit in a federal statute. *See Cort* v. *Ash*, 422 U.S. 66 (1975); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979).

None of the lower federal courts that have extended *Wilko* to bar arbitration of claims under Section 10(b) have considered whether that Section contains the sort of language creating a "special right" that led to this Court's decision in *Wilko*.[7] On the one occasion that this Court has directly confronted the question, it held that no such right was explicit or implicit in Section 10(b). In *Scherk* v. *Alberto-Culver Co.*, *supra*, the Court noted that "federal case law has established that § 10(b) and Rule 10b-5 create an implied private cause of action . . ." but held that "the [Exchange] Act itself does not establish the 'special right' that the Court in *Wilko* found significant." 417 U.S. at 513-14.[8] Thus, unlike the express right of action under Section 12(2), the judicially inferred right of action under Section 10(b) can hardly be considered to have been part of the statutory scheme of the Exchange Act. Accordingly, neither Section 10(b) nor the legislative history of the Exchange Act permit the conclusion that Congress, in

7 *See, e.g., DeLancie* v. *Birr, Wilson & Co.*, 648 F.2d 1255, 1258-59 (9th Cir. 1981); *Mansbach* v. *Prescott, Ball & Turben*, 598 F.2d 1017, 1039 (6th Cir. 1979); *Merrill Lynch, Pierce, Fenner & Smith* v. *Moore*, 590 F.2d 823, 827-29 (10th Cir. 1978); *Weissbuch* v. *Merrill Lynch, Pierce, Fenner & Smith*, 558 F.2d 831, 833-35 (7th Cir. 1977); *Sibley* v. *Tandy Corp.*, 543 F.2d 540, 543 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977); *Ayres* v. *Merrill Lynch, Pierce, Fenner & Smith*, 538 F.2d 532, 536 (3d Cir.), *cert. denied*, 429 U.S. 1010 (1976); *Greater Continental Corp.* v. *Schechter*, 422 F.2d 1100, 1103 (2d Cir. 1970); *Macchiavelli* v. *Shearson, Hammill & Co.*, 384 F. Supp. 21, 27-28 (E.D. Cal. 1974); *Reader* v. *Hirsch & Co.*, 197 F. Supp. 111, 116-17 (S.D.N.Y. 1961).

8 The early decisions that inferred a private right of action from Section 10(b) did so not on the basis of factors enumerated in this Court's decision in *Cort* v. *Ash*, 422 U.S. 66 (1975), but on the basis of a "tort" analysis founded on Section 286 of the Restatement of Torts. American Law Institute, *Restatement of Torts* § 236 (1934). *See Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), and *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951). This analysis was rejected by the Court in *Cort* as a basis for judicial inference of implied causes of action. *See also Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979).

adopting that legislation, thereby *intended* to repeal the Arbitration Act. That ends the inquiry. Simply stated, it is one thing for the lower federal courts to infer a private right of action for damages where Congress has created none; it is quite another for those courts by so doing to repeal the strong public policy favoring arbitration given effect by Congress in the Arbitration Act.

Furthermore, the concern this Court expressed in *Wilko*, that arbitrators might not fully appreciate the "substantial" differences between a Section 12(2) action and one in common law fraud, and might therefore not do full justice to the "special right" created by Section 12(2), is not present here, inasmuch as the elements of a claim under Section 10(b) more closely resemble common law fraud.[9]

Any suggestion that Section 10(b) might be misapplied in arbitration is further undercut by the structure provided for arbitration of disputes in the securities industry. The principal securities exchanges and the National Association of Securities Dealers, Inc. ("N.A.S.D.") provide arbitration facilities for disputes—like the dispute at issue here—involving members of those organizations and their public customers. *See, e.g.*, Constitution of the New York Stock Exchange, Inc., Art. VIII, 2 N.Y.S.E. Guide (CCH) ¶¶ 1351-1357; Rules 600-33 of the New York Stock Exchange, Inc., *Id.* ¶¶ 2600-2633; Uniform Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., N.A.S.D. Manual (CCH) ¶¶ 3701-3744.[10] The rules of the exchanges and the N.A.S.D. all

9 For example, *scienter* is a key element of both a Section 10(b) and a common law fraud action. In both cases, the plaintiff must establish causation.

10 These rules have been expressly approved by the Securities and Exchange Commission, which has found them to be in the public interest and in furtherance of just and equitable principles of trade. *See* Exchange Act Release No. 16390, S.E.C. (Nov. 30, 1979) 18 S.E.C. Docket 1197 (1979). The Commission retains jurisdiction to correct any perceived abuses or unfairness in the uniform arbitration rules pursuant to Section 19 of the Exchange Act, 15 U.S.C. § 78s.

provide for panels of arbitrators drawn from the securities industry and the public.[11] These arbitrators, many of whom have substantial knowledge of and experience with the framework of the federal securities laws and the rules promulgated thereunder, are well able to hear and adjudicate claims arising under Section 10(b). Securities industry arbitration panels can and routinely do resolve disputes involving alleged violations of Section 10(b) between members of the exchanges or the N.A.S.D. *See, e.g., Brown* v. *Gilligan, Will & Co.*, 287 F. Supp. 766, 772 (S.D.N.Y. 1968); *Axelrod & Co.* v. *Kordich, Victor & Neufeld*, 320 F. Supp. 193 (S.D.N.Y. 1970), *aff'd*, 451 F.2d 838 (2d Cir. 1971). Indeed, such panels can and do resolve claims brought by customers under Section 10(b), which are considered arbitrable if the customer agrees to arbitrate after the dispute arises. *Moran* v. *Paine, Webber, Jackson & Curtis*, 389 F.2d 242 (3d Cir. 1968); *Gardner* v. *Shearson, Hammill & Co.*, 433 F.2d 367 (5th Cir. 1970), *cert. denied*, 401 U.S. 978 (1971). The argument that arbitrators are less equipped than federal district courts to resolve such claims between public customers and member firms efficiently and properly is meritless. The organizations that sponsor arbitrations of securities industry disputes, including the New York Stock Exchange, the American Stock Exchange, and the N.A.S.D., provide arbitration panels that include persons well familiar with the securities laws and the customs and practices in the securities industry. Accordingly, any fear that arbitration panels unfamiliar with Section 10(b) may rule on such disputes is wholly misplaced.[12]

In any event, the argument that arbitrators should not be trusted to apply the law correctly is flawed. First, there is no

11 These arbitration rules provide that, in matters involving disputes between public customers and member firms of the exchanges or the N.A.S.D., the majority of the arbitrators shall be "public" arbitrators, *i.e.*, persons unaffiliated with any member firm. *See, e.g.*, Uniform Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., N.A.S.D. Manual (CCH) ¶ 3719.

12 *See Wilko* v. *Swan*, *supra*, 346 U.S. at 439 (Franfurter, J., dissenting) ("There is nothing . . . to indicate that the arbitral system . . . would not afford plaintiff the rights to which he is entitled").

basis for the conclusion that any such risk is greater in cases that involve the federal securities laws than in other cases. Second, and as the Second Circuit has held, "[L]ogically, if the possibility that an arbitrator may make an unreasonable error of law alone justifies enjoining one arbitration, it requires enjoining all." *Fallick* v. *Kehr*, 369 F.2d 899, 903 (2d Cir. 1966).

The securities laws' objective of protecting public investors will not be undermined by referring Section 10(b) claims to arbitration. First, to the extent that courts have determined that a judicially inferred private damages remedy under Section 10(b) is a necessary adjunct to the regulatory and remedial scheme created by Congress in the federal securities laws, that remedy is not diminished by the forum in which it is resolved. To require that those who have agreed to arbitrate disputes with brokers submit their disputes—even ones involving alleged violations of Section 10(b)—to arbitration does not affect or limit that remedy. Such a requirement, already express in the Arbitration Act, would merely give effect to the policy underlying the Arbitration Act and would thereby reduce the dockets in the lower federal courts. Second, arbitration may be compelled only in instances where the aggrieved plaintiff has had a contractual relationship with a broker that provides for arbitration of disputes. Matters involving misleading prospectuses, market manipulation, short-swing insider trading and other "fraudulent and manipulative devices" practiced at the expense of the general public would remain subject to the panoply of regulatory remedies available to the Securities and Exchange Commission and the express rights of action set forth in the Securities Act and the Exchange Act.[13] Such claims, in most instances, would continue to be resolved in court, not by arbitration.

As this Court has recognized, whether an agreement to arbitrate a Section 10(b) claim waives compliance with the Exchange Act in violation of Section 29(a) thereof is an entirely different question from that decided by *Wilko* v.

13 15 U.S.C. §§ 77k, 77*l*, 78i, 78p, 78r.

Swan. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. at 513. As shown above, the policy arguments this Court found so compelling in the context of the Securities Act in *Wilko* are completely absent in the context of Section 10(b). Because the Exchange Act contains none of the unique provisions that led this Court in *Wilko* to equate an arbitration clause with a waiver of compliance with the provisions of the Securities Act, an arbitration clause does not constitute a waiver of rights voidable under Section 29(a) of the Exchange Act. In an era when federal dockets are crowded with suits between customers and brokers, such hypothetical concerns amount to little in comparison with the efficiency and dispatch that characterize arbitration decisions.[14]

The Court has consistently reaffirmed the vitality of the policies underlying the Arbitration Act. In *Wilko* v. *Swan*, *supra*, the Court noted that the Arbitration Act was intended to ensure that parties to an agreement to arbitrate would be freed from the expense and delay of litigation in the courts, 346 U.S. at 431-32. That policy was given effect in *Scherk* v. *Alberto-Culver Co.*, *supra*, where the Court ruled, albeit in unique circumstances, that federal securities law claims could be submitted to arbitration. More recently, in *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, ___ U.S. ___, 103 S. Ct. 927 (1983), the Court reiterated the strong federal policy favoring enforcement of agreements to arbitrate under the Arbitration Act.[15] Again, in *Southland Corp. v. Keating*,

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14 Statistics compiled by the Administrative Office of the U.S. Courts reveal that during the twelve months ended March 31, 1984, a total of 3,046 "Securities and Commodities Exchange" civil actions were filed in federal district courts. *See* Federal Judicial Workload Statistics (March 31, 1984). This figure represents a 32% increase over such filings for the calendar year 1982. There is nothing in recent history that suggests that this trend will soon abate. Indeed, the opposite would appear to be true.

15 In *Moses H. Cone*, the Court rejected an attempt to avoid arbitration based on state law that would have permitted the dispute to be resolved in state court, holding, *inter alia*, that the Supremacy Clause of the Constitution required that state law yield to the Arbitration Act. 103 S. Ct. at 941.

___ U.S. ___, 104 S. Ct. 852 (1984), this Court reiterated the unambiguous mandate of the Arbitration Act that parties to an agreement to arbitrate should be able to resolve disputes between them "in arbitration as quickly and easily as possible." 104 S. Ct. at 856.

In any event, the strong federal policy favoring the enforcement of arbitration agreements, a policy consistently acknowledged by this Court, is far more compelling than a wholly speculative concern that arbitration might not give plaintiffs a proper resolution of their claims under Section 10(b). The Arbitration Act "was designed to allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts . . . .' H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924); *see also* S. Rep. No. 536, 68th Cong., 1st Sess. (1924)." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 510-11.

The *amici* respectfully submit that the United States Arbitration Act applies to claims brought under Section 10(b) of the Securities Exchange Act of 1934. Respondent's Section 10(b) claims herein are thus arbitrable under the existing agreement between Petitioner and Respondent to submit disputes to arbitration. Accordingly, there is no non-arbitrable federal claim for Respondent's pendent claim to be "intertwined" with, and the decision of the Ninth Circuit below should be reversed.

II.

AN ARBITRATION CLAUSE IS BINDING UPON STATE LAW CLAIMS PENDENT TO CLAIMS UNDER THE SECURITIES EXCHANGE ACT OF 1934.

The Ninth Circuit, in its decision below affirming the denial of Petitioner's motion to compel arbitration, erroneously adopted the so-called "intert ning doctrine". *Byrd* v. *Dean Witter Reynolds, supra*, 726 F at 554. That doctrine, developed by the Fifth and Elevent rcuits[16], but rejected by the Second, Sixth, Seventh, and Eig a Circuits[17], cannot stand as a matter of federal law. The arguments and authorities set forth in Petitioner's brief articulate the reasons for which this Court should set the "intertwining doctrine" aside. The *amici* join in those arguments and adopt them. The arguments set forth herein are intended solely to complement Petitioner's arguments.

Even assuming, as does the Ninth Circuit, that *Wilko* may be read to bar arbitration of claims arising under Section 10(b), there is nothing in *Wilko* or the Exchange Act that permits courts to ignore the Arbitration Act and to deny arbitration of pendent common law or state law claims. Indeed, the plain language of the Arbitration Act compels the enforcement of agreements to arbitrate state law claims that are pendent to Exchange Act claims. Because the federal securities claims by definition involve commerce, *Wilko* v. *Swan*, 346 U.S. at 430, and the Arbitration Act governs contracts "evidencing a transaction involving commerce", the factual connection between

16 *Miley* v. *Oppenheimer & Co.*, 637 F.2d 318 (5th Cir. 1981); *Sibley* v. *Tandy Corp.*, 543 F.2d 540 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977); *Merrill Lynch, Pierce, Fenner & Smith* v. *Haydu*, 675 F.2d 1169 (11th Cir. 1982).

17 *Kavit* v. *A. L. Stamm & Co.*, 491 F.2d 1176 (2d Cir. 1974); *Liskey* v. *Oppenheimer & Co.*, 717 F.2d 314 (6th Cir. 1983); *Dickinson* v. *Heinold Securities*, 661 F.2d 638 (7th Cir. 1981); *Surman* v. *Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59 (8th Cir. 1984), *petition for cert. filed*, ___ U.S.L.W. ___ (July 25, 1984).

the pendent claims and the Section 10(b) claims necessarily brings the pendent claims within the ambit of the Arbitration Act. Respondents, and the minority courts, have not demonstrated why the Arbitration Act does not render enforceable agreements to arbitrate these pendent claims.

Respondents, and the minority courts, assert that the enforcement of agreements to arbitrate pendent claims may prolong litigation. Respondent's Brief in Opposition to Certiorari at 6. They assert that bifurcation of pendent state and common law claims from non-arbitrable federal securities law claims will require two adjudications of the same series of operative facts. Yet it is far from clear that bifurcation will waste the time of litigants. In the first place, if the claims are similar, the trial court may and should stay arbitration of the pendent claims pending resolution of the federal claims. If the plaintiff succeeds on the federal claims, there will be no need to arbitrate the pendent claims, as his grievance will have been satisfied. Thus, the issues to be resolved at arbitration will be substantially narrowed, thereby avoiding the possibility of inconsistent findings on the merits of the different claims. Moreover, a bifurcated proceeding will save litigants' time to the extent that it will narrow the scope of discovery and will limit the inevitable and time consuming motion practice associated with such litigation. Not only is this vague policy of saving *litigants'* time wholly unconnected with the policies underlying the Arbitration Act, but its soundness is at best questionable.

Nor can the "intertwining doctrine" depend on an implied repeal of the Arbitration Act to exempt pendent claims from the effect of an agreement to arbitrate them. To the contrary, the Arbitration Act preempts conflicting state law under the Supremacy Clause of the United States Constitution. *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Co.*, *supra*. The exception carved out by *Wilko* v. *Swan* has no application whatsoever to pendent state law claims, but applies only to express rights of action under the Securities Act of 1933. The federal policy considerations that underlie the rule of *Wilko* simply have no application to pendent claims.

Finally, the "intertwining doctrine", if affirmed, will encourage the filing of dubious Section 10(b) claims for the sole purpose of insulating state law claims from otherwise valid and enforceable agreements to arbitrate. That doctrine, if allowed to stand, will inevitably result in a continuing spate of time consuming and expensive purported federal securities law claims in federal district court that would otherwise be resolved in arbitration. It is difficult to conjure up a more obvious violation of Congress's objective in adopting the Arbitration Act.

As demonstrated above, the "intertwining doctrine" stands in direct contravention to the Arbitration Act. Scrutiny of the policy considerations underlying that doctrine show them to be open to serious question. At the very least, those considerations are dwarfed by the vital federal policies of unburdening the federal courts from unnecessary litigation, relieving parties from the expense of litigation, and enforcing contractual provisions providing for arbitration. Accordingly, the *amici* respectfully submit that this Court should reject the "intertwining doctrine" and reverse the decision below.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Dated: July 26, 1984

Respectfully submitted,

JOSEPH G. RIEMER, III
Counsel of Record; and
JUDITH WELCOM
PAUL WINDELS III
BROWN, WOOD, IVEY,
MITCHELL & PETTY
One World Trade Center
New York, New York 10048
(212) 839-5300

Attorneys for Amici Curiae

Of Counsel:

SECURITIES INDUSTRY ASSOCIATION, INC.
William J. Fitzpatrick, Esq.

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED
Daniel A. Dolan, Esq.
Eric Rosenberg, Esq.

DREXEL BURNHAM LAMBERT INCORPORATED
Paul A. Merolla, Esq.

MOSELEY, HALLGARTEN, ESTABROOK & WEEDEN INC.
Kevin J. Moynihan, Esq.

SUTRO & CO.
INCORPORATED

Daniel B. Sullivan, Esq.

DOMINICK & DOMINICK,
INCORPORATED

Robert C. Harrison, Esq.

RESPONDENT'S

BRIEF

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October Term, 1983

DEAN WITTER, REYNOLDS, INC.,

Petitioner,

vs.

A. LAMAR BYRD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

ERIC V. BENHAM
Counsel of Record
DONALD MCGRATH II
SULLIVAN, DELAFIELD,
MCGRATH & MCDONALD

1200 Third Avenue, Suite 1403
San Diego, CA 92101
Telephone: (619) 234-6781

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED

I. In a case containing non-arbitrable claims brought under the federal securities laws does the District Court have discretion to deny arbitration of pendent claims having the same factual basis?

II. Did the District Court properly exercise its discretion to deny arbitration of pendent claims which are factually identical to a non-arbitrable federal securities claim where arbitration would be inefficient and duplicative and might adversely affect implementation of the federal securities laws?

III. Did the District Court properly exercise its discretion to deny arbitration of pendent claims which are factually identical to a non-arbitrable federal securities claim where the arbitration provision is part of a contract of adhesion which gives the broker unfair substantive and procedural advantages?

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No. 83-1708

In The

Supreme Court of the United States

October Term, 1983

DEAN WITTER, REYNOLDS, INC.,

Petitioner,

vs.

A. LAMAR BYRD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

The Respondent, A. LAMAR BYRD, respectfully requests that this court affirm the Ninth Circuit's opinion in this case. That opinion is reported at 726 F.2d 552.

STATEMENT OF THE CASE

A. Nature of the Case.

This case arises out of the acts of DEAN WITTER, REYNOLDS, INC. and its agents regarding the investment account of plaintiff, A. LAMAR BYRD.

On December 1, 1982, DR. BYRD filed his Complaint alleging facts stating claims for relief under the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.*, the securities laws of the state of California, common law fraud, breach of fiduciary duty and negligent management. (J.A. 1)

B. Course of Proceedings and Disposition in the Court Below.

On February 14, 1983, DEAN WITTER, REYNOLDS, INC. (hereinafter referred to as "DEAN WITTER") moved the District Court for an order to sever plaintiff's pendent state law claims and compel their arbitration. Defendant's motion also sought to stay the arbitration of the pendent state law claims until litigation of the federal securities claim was concluded. (J.A. 11) By its order entered March 14, 1983, the United States District Court denied defendant's motion in its entirety (Appendix B to the Petition for Certiorari). The order of the District Court was affirmed by the United States Court of Appeals for the Ninth Circuit on February 27, 1984 (Appendix A to the Petition for Certiorari).

C. Statement of Facts.

The defendant, DEAN WITTER, is a securities broker-dealer. In early 1981, JOHN DOUGLAS GALE (hereinafter referred to a "GALE") an agent and employee of the defendant DEAN WITTER, represented to DR.

BYRD that if BYRD sold his dental practice and allowed GALE to invest the proceeds of $160,000 in securities through DEAN WITTER, GALE could provide plaintiff with a regular monthly income of $4,000. In reliance on this representation, BYRD sold his dental practice and invested $160,000 with DEAN WITTER. Without BYRD's consent, GALE altered a client information form to misrepresent BYRD's investment objectives and his qualifications to invest in speculative investments.

In August, 1981, when BYRD commenced doing business with DEAN WITTER, he was presented with a standard form Customer's Agreement. (J.A. 14) Unlike the Agreement reproduced in the joint appendix on six full pages, the true document consisted of a single 8½" x 11" sheet of paper printed in very small type. Paragraph 16 (J.A. 18) provides as follows:

> "Any controversy between you and the undersigned arising out of or relating to this contract for the breach thereof, will be settled by arbitration, in accordance with the rules, then obtaining, of either the Arbitration Committee of the Chamber of Commerce of the State of New York, or the American Arbitration Association, or the Board of Arbitration of the New York Stock Exchange, as the undersigned may elect. If the undersigned does not make such election by registered mail addressed to you at your main office within five (5) days after receipt of notification from you requesting such election, then the undersigned authorizes you to make such election on behalf of the undersigned. Any arbitration hereunder shall be before at least three arbitrators and the award of the arbitrators, or of a majority of them, shall be final, and judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction."

Paragraph 17 of that same document (J.A. 18) provides in part:

> "This Agreement and its enforcement shall be governed by the laws of the State of New York . . . . "

These provisions were not freely negotiated with DR. BYRD, rather they were presented without explanation or opportunity to consider them or to consult with counsel. The Agreement was signed by DR. BYRD as a condition of doing business and without any appreciation for the procedural and substantive effects of those provisions.

From September, 1981 to March, 1982 GALE traded plaintiff's account in "uncovered" or "naked" options without plaintiff's prior consent. GALE treated plaintiff's account as a "discretionary" account, even though he had no written authority granting DEAN WITTER discretion to purchase and sell securities on behalf of plaintiff without his prior approval. Between September, 1981 and March, 1982, GALE engaged in an excessive number of purchases and sales of option contracts resulting in a "churning" of BYRD's account. GALE represented to BYRD that he should pay no attention to the monthly statements received from DEAN WITTER since such statements did not accurately reflect the status of his account. GALE affirmatively represented to BYRD that trading in his account was generating a profit when in fact his account had suffered a loss of about $100,000. When BYRD asked DEAN WITTER's branch manager to examine GALE's handling of the account, BYRD was assured that the account was being handled properly and he was encouraged to retain GALE as his account executive.

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SUMMARY OF ARGUMENT

The District Court has discretion to retain jurisdiction over arbitrable pendent claims which are factually and legally intertwined with a non-arbitrable Federal Securities claim. The United States Arbitration Act, 9 U.S.C § 1 *et seq.* does not expressly require severance and separate arbitration of pendent claims in a mixed claims case. The Act should not be construed to divest the District Court of discretion to retain jurisdiction of the entire case where severance and separate arbitration would be inefficient and interfere with the effect of implementation of the federal securities laws.

Compelling bifurcation and separate arbitration of the pending claims interferes with the effective implementation of the securities laws by making it more difficult and expensive for the investor to pursue his claim. Furthermore, compelled arbitration is in conflict with the express provisions of the federal securities laws which preserve state law remedies.

The federal policy favoring enforceability of arbitration agreements should be modified in the circumstance of adhesion contracts imposed on investors as a condition of access to the securities markets. Such agreements should be subject to strict scrutiny and provisions which are contrary to the reasonable expectations of investors should be invalidated. In the agreement before this Court a reasonable investor would not knowingly have agreed to the expense and delay of a bifurcated proceeding, he would not have agreed to utilize a foreign law which does not permit the imposition of punitive damages, and he would not have agreed to an arbitral body which would

require him to travel far from his home to prosecute his case.

A stockbroker is a fiduciary and as such he may not, without full disclosure, gain an advantage over his beneficiary. This arbitration agreement gives DEAN WITTER unfair substantive and procedural advantages over DR. BYRD which are constructively fraudulent.

The District Court has discretion to determine whether arbitration of the pendent claims was freely bargained for and whether compelling arbitration is fair and reasonable under the particular facts presented.

ARGUMENT

I.

The District Court Has Discretion To Retain Jurisdiction Of Pendent Claims Which Are Factually Identical To Non-Arbitrable Federal Securities Claims.

The Court of Appeals held that where a non-arbitrable federal securities claim and otherwise arbitrable pendent state claims in a complaint are based on identical facts, the District Court has discretion to deny arbitration of the pendent claims to prevent inefficiency and duplication and to further the goals of protective federal legislation. A significant number of courts addressing this issue have agreed. Specifically, the United States Courts of Appeal for the Fifth[1] and Eleventh[2] Circuits and District Courts in the Second[3], Third[4], and Tenth[5] Circuits have refused to mandate severance and separate arbitration without considering the attendant circumstances.

[1] *Miley v. Oppenheimer & Co.*, 637 F.2d 318 (5th Cir. 1981).

[2] *Merrill Lynch, Pierce, Fenner & Smith v. Haydu*, 625 F.2d 1169 (11th Cir. 1982).

Courts of Appeal in the Sixth[6] and Seventh Circuits[7], and more recently in the Eighth Circuit[8], have held that the United States Arbitration Act, 9 U.S.C. § 1 *et seq.*, divests the District Courts of any discretion regarding arbitration in cases containing both arbitrable and non-arbitrable claims. However, a reasonable exercise of discretion by the District Court is consistent with both the express provisions of the Arbitration Act and the goals expressed by Congress in enacting that legislation.

A. The Arbitration Act Does Not Mandate The Separate Resolution of Arbitrable and Non-Arbitrable Claims.

DEAN WITTER and its *amici curiae* rely on the United States Arbitration Act, 9 U.S.C. § 1 *et seq.*, for their contention that the District Court lacks discretion to retain jurisdiction of a case with both arbitrable and non-arbitrable claims. They contend that by virtue of

[3] *Fox v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 453 F. Supp. 561 (S.D.N.Y. 1978).

[4] *Breyer v. First Natl. Monetary Corp.*, 548 F. Supp. 955 (D.N.J. 1982).

[5] *Lane v. Dean Witter Reynolds, Inc.*, 505 F. Supp. 619 (W. D. Okla. 1980).

[6] *Liskey v. Oppenheimer & Co.*, 717 F.2d 314 (6th Cir. 1983).

[7] *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638 (7th Cir. 1981).

[8] *Surman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 733 F.2d 59 (8th Cir. 1984).

that legislation, arbitrable claims must be severed and separately arbitrated without consideration of the attendant circumstances.

The Arbitration Act, however, does not address the problem of cases mixing arbitrable and non-arbitrable claims and certainly does not expressly forbid courts to hear arbitrable claims in the context of a mixed claims case. *Cunningham v. Dean Witter, Reynolds, Inc.*, 550 F. Supp. 578, 583 (E.D. Cal. 1982).

Prior to the enactment of the Arbitration Act of 1925, courts routinely refused to enforce arbitration agreements on the ground that they ousted the court of its jurisdiction.

> "Congress intended the Act to eliminate 'an anachronism in our law' arising from the efforts of jealous English Courts to protect their jurisdiction."

Id., at 583. (*quoting* H. R. Rep. No. 96, 68th. Cong., 1st. Sess., 1 (1924)).

In enacting the Arbitration Act, Congress intended "to place arbitration agreements upon the same footing as other contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (*quoting* H. R. Rep. No. 96, 68th. Cong., 1st. Sess., 1-2 (1924)).

By virtue of the Arbitration Act, agreements to arbitrate are not per se unenforceable. It does not follow that such agreements are enforceable in all circumstances and that the court lacks discretion to deny arbitration where it would conflict with other federal policies or where the benefits of arbitration cannot be realized. As the court in *Cunningham* stated:

> "The problem Congress intended to rectify was that essentially no arbitration agreements could be enforced in a court of law . . . It by no means follows that Congress, in making arbitration agreements enforceable in court, intended that all such agreements be blindly enforced whatever the attendant circumstances."

Cunningham v. Dean Witter, Reynolds, Inc., 550 F. Supp. at 583.

B. The Arbitration Act Should Be Construed So As To Further The Goals Expressed By Congress As The Basis For Its Enactment.

The Arbitration Act does not expressly require arbitration in cases mixing arbitrable and non-arbitrable claims. Nevertheless, some courts have construed that legislation as implying a requirement of severance and separate arbitration.[9] Those courts construe the Arbitration Act as divesting the District Court of all discretion to retain jurisdiction of pendent claims without regard for the particular facts of the case.

This Court must determine the proper scope of the Arbitration Act. The Arbitration Act should not be construed to require arbitrable pendent claims having the same factual basis as non-arbitrable federal securities claims to be severed and separately arbitrated without regard to the inefficiency and duplication which that would cause. The Arbitration Act does not divest the District Court of discretion to retain jurisdiction of arbitrable pendent claims to promote the protective purposes of

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[9]See, e.g., *Dickinson v. Heinold Securities, Inc.*, 661 F.2d at 646.

federal securities legislation. The Arbitration Act does not require severance and separate arbitration of pendent claims in the context of a contract of adhesion which gives procedural and substantive advantages to the party with a superior bargaining position.

Legislation should be construed so as to further the goals expressed by Congress as the basis for enactment of the legislation. *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968). An interpretation which frustrates fulfillment of the legislative intent should be avoided. In *National Petroleum Refiners' Association v. F.T.C.*, 482 F.2d 672, 689 (D.C. Cir. 1973), the court stated:

> "In determining the legislative intent, our duty is to favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment . . . ."

By permitting the enforcement of arbitration agreements, Congress hoped "[t]o avoid the delay and expense of litigation." S. Rep. No. 536, 68th. Cong., 1st Sess., 3 (1924). However, in a case mixing arbitrable and non-arbitrable claims based on identical facts, to compel arbitration would cause delay, inefficiency and additional expense. Thus, compelled arbitration of plaintiff's pendent claims runs counter to the legislative goal of arbitration. In *Cunningham v. Dean Witter, Reynolds, Inc.*, 550 F. Supp. at 584, the Court came to the same conclusion:

> "The *Dickinson (v. Heinold Securities*, 661 F.2d 638 (7th Cir. 1981)) solution to a suit involving non-arbitrable federal securities claims and arbitrable pendent claims renders effectuation of the express congressional policy of saving time and expense of litigation more difficult. The goal is simply not served by bifurcating a unitary lawsuit into two separate proceedings, each of which would likely entail a hearing on the same evidentiary facts and deliberation upon essentially the same factual and legal problems."

DEAN WITTER, in seeking to compel arbitration of the pendent claims in this case, relies on the "sanctity of contractual agreements to arbitrate disputes". (Brief for the Petitioner at 31). DEAN WITTER contends that it makes no difference if bifurcation of the action is less efficient and costs more because the contract provides for arbitration and the Arbitration Act requires enforcement of the agreement of the parties.

In support of this result, DEAN WITTER relies on the recent decision of this court in *Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.*, 460 U.S. 1 (1983). In *Cone* this court did hold that the Arbitration Act required enforcement of an arbitration agreement even if that resulted in piecemeal resolution of the action. Nevertheless, several factors distinguish the case at bench from that presented in *Cone:*

1. The contract provision in *Cone* was freely negotiated between parties of equal bargaining strength.

2. The arbitration provision in *Cone* did not give unfair procedural and substantive advantages to one party.

3. The enforcement of the arbitration provision in *Cone* did not affect the implementation of federal protective legislation.

4. The decision in *Cone* did not result in piecemeal resolution as to any particular defendant.

II.

The District Courts Have Discretion to Retain Jurisdiction of Arbitrable Pendent Claims to Promote the Implementation of Federal Securities Legislation.

In *Wilko v. Swan*, 346 U.S. 427 (1953), the Supreme Court faced an effort to compel arbitration of claims brought under the Securities Act of 1933, 15 U.S.C. § 77a *et. seq.* The Court held that the policy of protecting investors expressed in the Securities Act outweighed the more general policy favoring economical, expeditious litigation. The arbitration agreement was, therefore, invalidated. Likewise, arbitration of claims based on the Securities Exchange Act of 1934 is not compelled.[10]

Wilko v. Swan, 346 U.S. 427 (1953) involved a balancing of competing values: prompt and economical resolution of disputes through arbitration versus promotion of the effective implementation of federal protective legis-

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[10]The Courts of Appeal have uniformly held that the policy against compelling arbitration of securities claims stated in *Wilko v. Swan* applies to claims based on the Securities Exchange Act of 1934. *DeLancie v. Birr, Wilson and Co.*, 648 F.2d 1255, 1258 (9th Cir. 1981); *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 (5th Cir. 1976); *Greater Continental Corp. v. Schecter*, 422 F.2d 1100, 1103 (2nd Cir. 1970); *Ayres v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 538 F.2d 532, 536 (3rd Cir.), cert. denied, 429 U.S. 1010 (1976); *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1039 (6th Cir. 1979); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831, 833-35 (7th Cir. 1977); *Surman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 733 F.2d 59 (8th Cir. 1984); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823, 827-29 (10th Cir. 1978); *Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 693 F.2d 1023, 1025-26 (11th Cir. 1982). The *amici curiae* contend that claims brought under the Securities Exchange Act of 1934 are arbitrable (Brief of *Amici Curiae* in Support of Petitioner, at 5). That issue was not raised by DEAN WITTER in its motion, and the issue is not properly before this court on review.

lation.[11] However, in a mixed claims case severance and separate arbitration of the pendent claims will cause delay, inefficiency and additional expense and it may also impact on implementation of the federal securities laws. A plaintiff with limited resources may have to choose to forego either the federal securities action in federal court or the state law claim subject to arbitration because he cannot afford to prosecute two separate actions.

Furthermore, the Securities Exchange Act of 1934 expressly protects and preserves both statutory and common law state remedies consistent with the federal securities laws. The language of the Act is explicit:

> "The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity . . . . "

15 U.S.C. §78bb(a).

However, enforcement of the arbitration provisions in this case will diminish the substantive remedies otherwise available to plaintiff under California law. Plaintiff seeks punitive damages against defendant for its alleged fraudulent acts. However, the standard "Customer's Agreement" containing the arbitration clause upon which defendant relies also provides that enforcement of the agreement is to be governed by New York law. (J.A. 18) The highest court of New York State has held unequivocally that punishment is the exclusive function of the sovereign, and therefore an arbitrator is *without power* to award punitive damages, even with the consent of the parties. *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 353 N.E.2d 793 (1976) (emphasis added).

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[11]346 U.S. at 188.

California has long permitted punitive damages for fraud and deceit. Cal.Civ. Code § 3294 (Deering, 1984). *Horn v. Guaranty Chevrolet Motors,* 270 Cal.App.2d 477, 484, 75 Cal.Rptr. 871 (1969), *Nelson v. Gaunt,* 125 Cal. App.3d 623, 643, 178 Cal.Rptr. 167 (1981). California courts permit punitive damages in securities cases upon a proper showing of fraud. *Black v. Shearson, Hammill & Co.,* 266 Cal.App.2d 362, 369, 72 Cal.Rptr. 157 (1968).

It has been accepted since *Globus v. Law Research Service, Inc.,* 418 F.2d 1276 (2d Cir. 1969), *cert. denied,* 397 U.S. 913 (1970), that punitive damages are not available for violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 77a, *et. seq.* But punitive damages under state law for torts involved in securities transactions have repeatedly been recovered in federal district court upon claims pendent to federal securities act claims. *Mihara v. Dean Witter & Co.,* 619 F.2d 814 (9th Cir. 1980), *Petrites v. J. C. Bradford & Co.,* 646 F.2d 1033 (5th Cir. 1981), *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 703 F.2d 1152 (10th Cir. 1981), *cert. denied,* — U.S. —, 104 S.Ct. 92 (1983).

If BYRD must try his case by arbitration under New York law he may lose the right he has under the law of California to seek punitive damages for the torts pleaded in his complaint, even though he would have enjoyed that right in a California Court or in Federal District Court.

This Court should hold that the District Courts have discretion to retain jurisdiction of arbitrable pendent claims which are factually intertwined with federal securities claims when they determine that severance and separate arbitration will adversely affect the implementation of the securities laws.

III.

The Federal Policy Favoring Arbitration Should Be Modified to Protect Investors Subject to Contracts of Adhesion.

There is no question that federal law generally favors arbitration. This Court has recently stated that:

> Section 2 [of the United States Arbitration Act] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary . . . .

Moses H. Cone Mem. Hosp. v. Mercury Construction Corp., 460 U.S. 1, at 21 (1983). See also *Southland Corp. v. Keating,* — U.S. —, 104 S.Ct. 852 (1984). Nevertheless this Court has acknowledged that the Arbitration Act of 1925 was enacted to make agreements to arbitrate future disputes "as enforceable as other contracts, but not more so," *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 404 n. 12 (1967). This Court has also recognized the drawbacks of arbitration. *Bernhardt v. Polygraphic Company of America, Inc.,* 350 U.S. 198 (1955). Against the benefits of informality, expedition and finality must be weighed the disadvantages of limited review, the possibilities of arbtrary and capricious results at the hands of untrained and possibly biased arbitrators, and the absence of any definite rule of law, any record, or any requirement that the arbitrator articulate the factual and legal

conclusions that underlie the award.[12] *Hale v. Friedman*, 281 F.2d 635 (D.C. Cir. 1960).

In the context of a freely negotiated contract between parties of equal bargaining power there may be no unfairness in enforcing an arbitration provision despite the inherent shortcomings of arbitration. However, to force arbitration on one who did not freely and knowingly bargain away the right to a judicial forum is patently unfair.

> "[T]he right to select judicial forum, vis-a-vis arbitration, is a 'substantial right,' not lightly to be deemed waived."[13]

When the Arbitration Act was enacted in 1925, the scope of Congressional power under the commerce clause was much narrower than we take for granted today. As those powers were then viewed, it would be unusual for an individual's ordinary investment transactions to involve him in interstate commerce. Most commercial litigation in the Federal Courts was between large business entities

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[12]See, e.g. *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211 (2nd Cir. 1972). Plaintiff's claims were dismissed without explanation by an arbitral panel of the New York Stock Exchange. Subsequently the defendant brokers were criminally indicted and convicted of doing precisely what plaintiff had alleged in his complaint. The District Court remanded the arbitration proceedings for specification of the facts the arbitrators found decisive in making their award. The Court of Appeals reversed, holding that the arbitrators were not required to disclose their reasoning. See also, Van Smith, *Breaking the Chains That Bind: Arbitration Agreements versus Forum Rights Under the Commodity Futures Trading Commission Act of 1974*, 16 San Diego L. Rev. 749, 753-761 (1979).

[13]*Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal.App.3d 19, 31, 136 Cal.Rptr. 378 (1977) (citing *Wilko v. Swan*, 346 U.S. 427, 438, 74 S.Ct. 182 (1953)), *Boyd v. Grand Trunk W.R. Co.*, 338 U.S. 263, 266 (1949).

rather than with consumers. Not until the Securities Act of 1933 and the Securities Exchange Act of 1934 did Congress undertake to regulate the securities markets and thereby open the federal courts to investors in securities.

Standard form contracts have become the means by which most people in this country conduct their personal affairs. Consumers are faced with standard form agreements in the form of bank account signature cards, loan applications, insurance applications, escrow instructions, and hospital admittance forms.

> "Standard form contracts probably account for more than 99% of all the contracts now made. Most persons have difficulty remembering the last time they contracted other than by standard form."[14]

As a practical matter, the only way individuals may take part in securities trading is through regulated markets through the use of a broker-dealer such as DEAN WITTER and its *amici curiae*. Those broker-dealers have uniformly required their customers to sign agreements such as the one at issue herein in order to conduct business in the securities markets. For this reason, the federal policy favoring arbitration should be modified to protect investors subject to contracts of adhesion imposed by the securities industry as a condition of access to the securities markets.[15]

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[14]Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 Harv. L. Rev. 529, at 529 (1971).

[15]Support for Respondent's position is implicit in decisions of this Court regarding broker customer relations in the securities industry. In *Wilko v. Swan*, 346 U.S. 427 (1953), this Court

(Continued on next page)

A. As a Contract of Adhesion This Arbitration Agreement Is Subject to Close Judicial Scrutiny.

The arbitration agreement which DEAN WITTER seeks to enforce appears as one of the fine-print provisions of a form contract provided by DEAN WITTER to all of its customers. Similar provisions appear in the customer agreements of the *amici curiae* and in customer agreements throughout the securities industry.[16] The customer agreement was drafted by DEAN WITTER; BYRD had no opportunity either personally or through an agent to negotiate its terms. The provision is buried

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(Continued from previous page)

held that an agreement to arbitrate disputes arising under the Securities Act of 1933 was unenforceable. Yet in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 *reh'g denied*, 419 U.S. 895 (1974), this Court enforced arbitration of a claim arising under Section 10(b) of the Securities Exchange Act of 1934.

Reconciliation of these two cases does not depend on the fact that different securities statutes were involved. The statutes contain equally strong language invalidating any writing purporting to waive rights to a judicial forum. The Courts of Appeal have uniformly held that *Wilko* precludes compelled arbitration of claims against brokers under the Securities Exchange Act of 1934 just as it does claims under the Securities Act of 1933. Nor is it a sufficient distinction to note that in *Scherk* the Section 10(b) allegation was but one of many claims in a broadly based lawsuit growing out of a business buy-out agreement. If plaintiff's Securities Act claims could be severed and all the rest consigned to arbitration so could the non-Securities Act claims of the parties in *Scherk*.

Plaintiff submits that the true reconciliation of *Scherk* with *Wilko* lies in the fact that *Wilko* involved an adhesive standard form contract between a broker and an individual customer whereas *Scherk* involved an individually negotiated agreement between multi-national corporations.

[16]*See, e.g., Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal.App.3d 19, 30 (1977). See also, Note, *Arbitration of Investor-Broker Disputes*, 65 Cal. L. Rev. 120, 122-127 (1977).

in print so small that customers rarely read them. DEAN WITTER and other members of the securities industry are in a vastly superior bargaining position vis-a-vis the individual investor. This is so not merely because they are large business entities but because trading in securities is restricted to members of the securities exchanges and securities specialists. Doing business with a securities broker is a condition of access to the securities markets. BYRD not only lacked any opportunity to bargain but also any realistic opportunity to look elsewhere for a more favorable contract.

The arbitration provision in the DEAN WITTER customer agreement meets all the characteristics of a contract of adhesion. In *Stevens v. Fidelity & Casualty Co.*, 58 Cal.2d 862, 882, 377 P.2d 284, 27 Cal.Rptr. 172 (1962) those characteristics were described as follows:

> "the term [contract of adhesion] refers to a standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsmen and the second party, must be accepted or rejected by the second party on a 'take it or leave it' basis, without opportunity for bargaining and under such conditions that the 'adherer' cannot obtain the desired product or service save by acquiesing in the form agreement."
>
> *See also, Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 632 (1943).

Contracts of adhesion are not automatically unenforceable. As was stated in *Graham v. Scissor-Tail Inc.*, 28 Cal.3d 807, 819, 623 P.2d 165, 171 Cal.Rptr. 604 (1981):

> "To describe a contract as adhesive in character is not to indicate its legal effect. It is rather 'the be-

> ginning and not the end of the analysis insofar as enforceability of its terms is concerned.' "

However, adhesive contracts are subject to strict judicial scrutiny. *Id.*, at 820. Provisions contrary to the reasonable expectations of the adhering party will not be enforced absent clearly expressed notice and understanding consent. *Stevens v. Fidelity & Casualty Co.*, 58 Cal.2d at 882.

Judicial scrutiny of adhesive arbitration provisions may result in the entire provision being invalidated. *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d at 826, *Hope v. Superior Court*, 122 Cal.App.3d 147, 122 Cal.Rptr. 851 (1981), *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal.App.3d 19, 136 Cal.Rptr. 378 (1977). At the very least such agreements should lose the favored status which agreements to arbitrate normally bear and be subject to strict judicial scrutiny. Aspects of the arbitration agreement that do not meet the reasonable expectations of the investor should be invalidated.

In the present case, DR. BYRD would not reasonably have expected a bifurcated proceeding which would delay a resolution of his claims and increase the cost of seeking redress, he would not reasonably have expected to forego his right to punitive damages, and he would not reasonably have expected DEAN WITTER to be able to choose an arbitral body which would require him to travel to another state or to another city within this state.

Strict scrutiny of the arbitration agreement in this case shows that DEAN WITTER took advantage of its bargaining position and its access to the securities markets to insulate itself from liability for punitive damages and to gain procedural advantages.

B. This Arbitration Agreement Was Procured Through Fraud.

A securities broker owes its customers fiduciary duties.

> " 'The relationship between broker and principal is fiduciary in nature and imposes on the broker the duty of acting in the highest good faith towards the principal . . .' with respect to stockbrokers it is recognized, [that] 'the duties of the broker, being fiduciary in character, must be exercised with the utmost good faith and integrity.' "

Twomey v. Mitchum, Jones & Templeton, Inc., 262 Cal. App.2d 690, 709, 69 Cal.Rptr. 222 (1968). In *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal.App.3d 19, 136 Cal.Rptr. 378 (1977), the court held that where a securities broker had induced his client to sign a customer agreement without disclosing the arbitration provisions, the provisions were constructively fraudulent. The court based its ruling on the finding that the broker had gained an advantage over the customer by including in the agreement a provision to arbitrate.

> "In a factual context somewhat similar to that before us, the Federal Court of Appeals has decried the practice of securities dealers 'using their superior bargaining position to require arbitration clauses in contracts with members of the investing public.' (*Laupheimer v. McDonnell & Co., Inc.* (2d Cir. 1974) 500 F.2d 21, 26.) and it is notable that the defendants and plaintiff, respectively, of the instant proceeding treat the subject arbitration clause as an advantage to be held, and as a disadvantage to be invalidated." *Id.*, at 31.

Likewise, in the present case, the arbitration provision has been treated as an advantage to be held by DEAN WITTER, the Securities Industry Association and the other securities brokers who have joined it as *amici curiae*.

Plaintiff urges this Court to hold that arbitration agreements imposed by the securities industry as contracts of adhesion for the purpose of gaining procedural and substantive advantages over their customers are constructively fraudulent and unenforceable. Such a holding is consistent with the federal policy favoring arbitration where arbitration has been freely negotiated. As is stated in *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal.App.3d at 32:

> "We are, of course, aware of the law's policy to 'recognize and give the utmost effect to arbitration agreements' . . . but the policy does not extend to compelling arbitration where none was agreed. '[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' (*Atkinson v. Sinclair Refining Co.*, (1962) 370 U.S. 238, 241 . . .) such agreements 'are binding when they are openly and fairly entered into and when they accomplish the purpose for which they are intended.'"

CONCLUSION

The judgment of the Court of Appeals which affirmed the order of the District Court denying the motion of DEAN WITTER to sever pendent claims and compel their arbitration should be affirmed.

DATED: September 10, 1984

Respectfully submitted,

By: Eric V. Benham
Counsel of Record

Donald McGrath II
Sullivan, Delafield,
McGrath & McDonald
1200 Third Avenue, Suite 1405
San Diego, CA 92101
Counsel for Respondent

REPLY

BRIEF

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No. 83-1708

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DEAN WITTER REYNOLDS INC.,

Petitioner,

vs.

A. LAMAR BYRD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR THE PETITIONER.

EUGENE W. BELL,
Counsel of Record; and
KEVIN K. FITZGERALD,
JONES, BELL, SIMPSON & ABBOTT,
800 Wilshire Boulevard,
Fifth Floor,
Los Angeles, Calif. 90017,
(213) 485-1555,
Attorneys for Petitioner.

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

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REPLY BRIEF FOR THE PETITIONER.

I

INTRODUCTION

Petitioner and defendant Dean Witter Reynolds Inc. (hereinafter "Dean Witter") seeks reversal of the decision of the United States Court of Appeals for the Ninth Circuit affirming the denial of arbitration of state law claims pendent to a federal securities law claim. Dean Witter contends that the Court of Appeals erred in not ordering the pendent state law claims to arbitration and staying that arbitration pending judicial resolution of the federal securities law claim.

In the Brief for the Respondent, respondent and plaintiff A. Lamar Byrd (hereinafter "Byrd") attempts to divert this Court from the real question at issue in the instant case, i.e., whether district courts may deny arbitration of pendent state law claims solely due to the presence of a federal securities law claim. Byrd attempts this diversion by presenting a new question for review in his Brief for the Respondent; a question which was neither presented at the petition for writ of certiorari stage or in the Brief for the Petitioner, nor mentioned in the pleadings and briefs filed in the district and appellate courts.

Byrd's argument concerning this new question disputes the enforceability of the arbitration agreement at issue in the instant case by asserting both that it was procured through fraud and is unenforceable as a contract of adhesion. As a basis for this argument, Byrd has added to his statement of "facts" matters not contained in the record below, either in the form of allegations in the complaint or averments by affidavit. *See* Brief for the Respondent, at 4. Since the enforceability of the arbitration agreement in this case is not an issue which was properly raised in the proceedings below, Byrd's argument concerning this issue should not be considered by this Court.

Byrd also argues in the Brief for the Respondent that district court discretion to deny arbitration of pendent state law claims will promote the implementation of the federal securities laws. As demonstrated *infra*, this contention is simply not correct, and for that reason, and the reasons set forth in the Brief for the Petitioner, this Court should reverse the decision of the United States Court of Appeals for the Ninth Circuit and order that Dean Witter's motion to compel arbitration be granted.

II

ARBITRATION OF STATE LAW CLAIMS WILL NOT ADVERSELY AFFECT IMPLEMENTATION OF THE FEDERAL SECURITIES LAWS

In the Brief for the Respondent, Byrd contends that arbitration of state law claims will adversely affect implementation of the federal securities laws. Byrd fails, however, to provide any persuasive support for this contention. Byrd's citation of *Wilko v. Swan*, 346 U.S. 427 (1953), in support of this contention is misplaced. In *Wilko*, this Court considered whether arbitration of a federal claim alleged under Section 12(2) of the Securities Act of 1933 could be compelled. In contrast, the procedure sought by Dean Witter in the instant case involves judicial resolution of Byrd's federal claim and arbitration of only his state claims. Arbitration of the state claims will not impact resolution of the federal claim since under the order requested, trial of the federal claim will precede arbitration of the state claims. Although Byrd further suggests that plaintiff "may" be forced to choose between prosecuting the federal or the state claims due to the cost of pressing two separate actions (Brief for the Respondent, at 13), this alleged choice, and the purported inefficiency of bifurcated resolution of arbitrable/nonarbitrable claim cases are both speculative and disputed. *See Liskey v. Oppenheimer & Co., Inc.*, 717 F.2d 314, 320 (6th Cir. 1983); *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638, 644 (7th Cir. 1981); Brief for the Petitioner, at 24 n. 10.

Even less persuasive is Byrd's recitation of state law remedies purportedly "lost" or "diminished" through arbitration. There simply is no federal question involved in assuring that Byrd retains his state law remedies. While Byrd cites Section 28(a) of the Securities Exchange Act of 1934,

15 U.S.C.A. §78bb(a) (West 1981)[1] for the proposition that "the Securities Exchange Act of 1934 expressly protects and preserves both statutory and common law state remedies" (Brief for the Respondent, at 13), that section merely indicates that the Securities Exchange Act of 1934 is not to be construed to preempt state law remedies. It provides no federal mandate for enforcement of state laws.

Byrd also suggests that arbitration of his state law claims will deprive him of substantive remedies. If his state claims are arbitrated, however, Byrd will obtain the same remedies to which he would have been entitled in state court. Had he brought his state claims in state court, they would have been ordered to arbitration.[2]

Byrd's general objection to arbitration based on concern for his remedies is unfounded. Arbitrators may not disregard the law in reaching their decisions, or those decisions may be vacated under 9 U.S.C.A. §10 (West 1970). *Local 711, I.A.T.S.E., AFL-CIO v. RKO General, Inc.*, 546 F.2d 1107, 1113 (2d Cir. 1977); *Botany Industries, Inc. v. N.Y. Joint Bd., Amalgamated Clothing Workers*, 375 F. Supp. 485, 490 n. 6 (S.D.N.Y.), *vacated on other grounds*, 506 F.2d 1246 (2d Cir. 1974). Byrd's specific concern that his "right"[3] to punitive damages will be lost by arbitration of his pendent claims is simply not relevant. Whether or not such damages can be awarded in an arbitration, there is

[1]The section provides: "The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity . . . ."

[2]See the authorities cited in note 14 of the Brief for the Petitioner.

[3]Byrd appears to imply that punitive damages are compensatory and that he is entitled to such damages. In fact, such damages are not favored in California and are "never awarded as a matter of right." *Henderson v. Security National Bank*, 72 Cal.App.3d 764, 771, 140 Cal.Rptr. 388 (1977).

no federal question involved in assuring their availability under Byrd's state law claims. They are clearly not available under §10(b) of the Securities Exchange Act of 1934, the federal claim in this case. *Globus v. Law Research Services, Inc.*, 418 F.2d 1276, 1283 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); Securities Exchange Act of 1934 §28(a), 15 U.S.C.A. §78bb(a) (West 1981).

III

BYRD'S ARGUMENT CONCERNING ENFORCEABILITY OF THE ARBITRATION AGREEMENT SHOULD NOT BE CONSIDERED

In the Brief for the Respondent, Byrd contends that the arbitration agreement in this case is unenforceable both because it was "procured through fraud" and because it is a "contract of adhesion". Byrd is attempting to divert the Court from the issue of arbitrability of state law claims pendent to a federal securities law claim by creating, for the first time, an issue as to the enforceability of the arbitration agreement itself.

The enforceability of the arbitration agreement in this case is not an issue properly before this Court. It was not raised as an issue in the briefs filed in petitioning for review by this Court, nor was it raised in the pleadings filed in the district court or the briefs filed in the United States Court of Appeals for the Ninth Circuit. Of decisive importance, there are no allegations in Byrd's complaint in the district court (J.A. 2) concerning the execution of the agreement or disputing its validity or enforceability. There is simply no support in the record for the "factual" matters asserted in the Statement of Facts portion of the Brief for the Respondent with respect to execution of the arbitration agreement. As this Court stated in *Russell v. Southland*, 12 How. 139, 159 (1851):

> "This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it for testimony to influence the judgment of this court sitting as an appellate tribunal."

See also Adickes v. Kress & Co., 398 U.S. 144, 157 n. 16 (1970).[4]

Since the enforceability of the arbitration agreement in this case is not an issue properly before this Court, Byrd's extensive argument in his Brief for the Respondent concerning this issue should be disregarded.[5]

---

[4]Similar arguments of adhesion and unconscionability, unsupported by allegations in the record, were made to the Seventh Circuit in *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984). The Seventh Circuit declined to hold the arbitration provision unconscionable "without the support of any evidence beyond mere allegations of unfairness contained in an appellate brief." *Id.*

[5]Even if this Court considers Byrd's argument concerning enforceability, it should conclude that the instant arbitration agreement is enforceable. Under California law, broker/dealer margin account agreements have been held not to be adhesion contracts and arbitration provisions in those agreements have been held to be enforceable. *Vernon v. Drexel Burnham & Co.*, 52 Cal.App.3d 706, 714-15, 125 Cal.Rptr. 147 (1975) (agreement not offered on a "take it or leave it" basis nor does subject matter ascend to a public "need" status). *Cf. Parr v. Superior Court*, 139 Cal.App.3d 440, 444, 188 Cal.Rptr. 801 (1983) (agreement held an adhesion contract but arbitration provision nevertheless enforceable).

Even those contracts deemed adhesory are enforceable according to their terms under California law unless beyond the "reasonable expectations" of the party or "unconscionable". *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 820, 171 Cal.Rptr. 604 (1981). Further, a California appellate court recently held that an arbitration provision in an agreement between a securities broker/dealer and its customer was neither beyond the customer's "reasonable expectations", since arbitration agreements in the commercial context are common, nor "unconscionable", since the provisions for arbitration provided the customer a "realistic and fair opportunity to prevail", and since the arbitration codes which would govern were approved by the Securities Exchange Commission and thus possessed "minimum levels of integrity". *Parr v. Superior Court*, 139 Cal.App.3d 440, 445-47, 188 Cal.Rptr. 801 (1983).

IV

CONCLUSION

Rather than directly addressing the issue of whether district courts have discretion to deny arbitration of state law claims solely on the basis of their pendency to a federal securities law claim, Byrd has devoted the bulk of his brief to argument concerning the enforceability of the instant arbitration agreement — an issue neither raised nor briefed in the district or appellate court. That portion of his argument devoted to the issue in this case references the purportedly adverse impact arbitration of pendent state law claims will have on implementation of the federal securities laws. The matters cited in support of that alleged impact, however, are not only disputed, but primarily concern impact on state, not federal remedies.

Petitioner Dean Witter contends that respondent Byrd has advanced no compelling justification for denying arbitration of his arbitrable state law claims in the instant case. Respondent has further failed to counter the arguments in favor of arbitration advanced in the Brief for the Petitioner. Petitioner therefore respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Ninth Circuit and remand this matter with the order that the district court sever and order arbitration of respondent's state law claims, and stay that arbitration pending judicial resolution of his federal securities claim.

DATED: November 1, 1984

Respectfully submitted,
EUGENE W. BELL
Counsel of Record; and
KEVIN K. FITZGERALD,
JONES, BELL, SIMPSON & ABBOTT,
Attorneys for Petitioner